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SUPERFUND IMPROVEMENT ACT OF 1985

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 51

A BILL TO EXTEND AND AMEND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, AND FOR OTHER PURPOSES

JUNE 7 AND 10, 1985

Serial No. J-99-30

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SUPERFUND IMPROVEMENT ACT OF 1985—S. 51

FRIDAY, JUNE 7, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Laxalt, Grassley, Hatch, McConnell, Specter, Simpson, Denton, Mathias, and Metzenbaum.

Staff present: Diana Waterman, general counsel; and Michael Wootten, staff counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. We will now convene the Superfund hearing, and we are going to recess and be back in 10 minutes so that we can vote.

[A brief recess was taken.]

The CHAIRMAN. The committee will come to order.

Today, the Committee on the Judiciary will begin its consideration of certain aspects of S. 51, the Superfund Improvement Act of 1985. As many of you may know, this bill was reported out by the Environment and Public Works Committee in early March.

On May 3, the distinguished ranking minority member of this committee, Senator Biden, and I wrote to Chairman Stafford and Senator Bentsen, the ranking minority member, of the Environment and Public Works Committee, expressing our interest in various provisions of the Superfund authorization having potential impact on judicial matters within the jurisdiction of this committee.

We had originally requested a 90-day sequential referral of S. 51. However, Senator Stafford's assurance that he will not introduce an amendment creating a Federal cause of action allowed us to agree on a shorter referral period.

I think it is fair to state that we all recognize the critical need to cleanup toxic waste from our environment and we support diligent efforts to do so. We do not intend to question the legitimate purpose and goals of Superfund within the context of these hearings.

Rather, the interest of the committee lies in maintaining the efficiency and integrity of our judicial system. The committee's review of certain aspects of S. 51 is essential to ensure a compatible balance between the purpose of Superfund and the fundamental legal standards embraced by our judiciary.

Specifically, the committee intends to confine its examination to the following: section 126, which would affect a defendant's right to seek contribution from other liable parties, as well as the timing of joining parties and for seeking contribution; sections 132 and 133, which would affect the right to review of a remedy ordered by EPA, as well as the timing of such review and the standard of review; and section 138, which would create the right for citizens to bring suits to enforce certain aspects of CERCLA.

The committee will also examine the strict, joint, and several liability standard as it applies to Superfund. However, consistent with the terms of our referral, the committee will not be proposing any amendments which modify that liability scheme. We anticipate a full airing of these issues in order to address the judicial and due process considerations presented by the Superfund Improvement Act.

We have an impressive list of witnesses appearing today and continuing on Monday at 2 p.m. The witnesses appearing today have been invited as experts in their fields to address the specific issues I have mentioned. Those witnesses appearing on Monday have requested an opportunity to testify and we have scheduled an additional day of hearing in order to allow them to do so.

We are pleased to have the opportunity to hear from Mr. Lee Thomas, Administrator, U.S. Environmental Protection Agency, and Assistant Attorney General Habicht from the Lands and Natural Resources Division of the Department of Justice, as well as others.

Before calling our first panel of witnesses, I ask unanimous consent that other written testimony be added to the record at the conclusion of the testimony we will be hearing. Hearing no objection, that will be done.

I join the other members of the committee in welcoming our witnesses. I ask that the complete statement of each witness be placed in the record and that the witnesses limit their summary remarks to 5 minutes. That way, we will give all a chance to be heard.

I think since the entire statement will go in the record, they can give the thrust of their statements within 5 minutes, unless there is some special reason why one should go longer.

Now, our first panel this morning is Mr. Lee Thomas, Administrator of the U.S. Environmental Protection Agency, and Assistant Attorney General Hank—is that pronounced Habicht?

Mr. **Habicht**. Habicht, sir.

The **Chairman**. Yes, Habicht, of the Justice Department Land and Natural Resources Division. Now, I want to welcome you, gentlemen. It is a pleasure to have you with us. I understand, Mr. Thomas, that you would like to begin with an overview of the policy issues, with Mr. Habicht then addressing the remaining issues. Again, I would ask each witness to limit their prepared testimony to 5 minutes.

Now, before beginning, I want to ask if any members of the committee have an opening statement. I see we have here the distinguished assistant majority leader, Senator Simpson, who is a member of this committee, and we are honored to call on him at this time.

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

Senator SIMPSON. Mr. Chairman, I thank you. Mine will be very brief. I may submit a more detailed one in the record. I simply want to state that I serve as a member of both committees, Environment and Public Works, and this committee, and I respect deeply Senator Thurmond; that is very obvious. And just is obvious is my respect for Senator Stafford.

We all serve together, again, on another committee, Veterans' Affairs. However, I always have some rather grave reservations about some of the staff activity with regard to the Committee on Environment and Public Works. It is not said in harshness; it is said out of a total aspect of reality.

I see often that on that staff, they deal with critical legal issues that this Judiciary Committee is well aware of and any attorney should be well aware of who has practiced law or been in the real life of the law.

There is a grave misunderstanding, I think, that comes. I think there are some things here we have to look at carefully: citizen suit provisions; changes involving contribution among parties facing joint and several liability; pre-enforcement review provisions, a new judicial review provision to open access to appeals.

There are any number of other issues. The Federal toxic tort issue is a sweeping one and will not be handled on the floor, but it will come back again and again and again as an old theme because that is the way it generates there; nationwide service of process, things that fly in the face of the Federal Rules of Procedure.

It comes from, I know, the best of motives over there with regard to that able staff, but they have forgotten the real world of law and litigation. I have often said that I think some of the bright and attentive and extraordinary lawyers in this place should be required to do four contested divorces, three probates where the heirs are scrapping before the body has even cooled, and four cases of affray in western bars where they have chewed a guy's ear off, and then come here to weave their web of activity and ability. [Laughter.]

And it is funny, but it is not funny, and it is very troubling to see that occur. So, Mr. Chairman, I think there is a fundamental legal issue here and one that I hope we will develop through the testimony and the panelists, and that is the central issue as to whether this whole program is imply driven by litigation, distinction piled on distinction, absurdity upon absurdity, and try to get to something that is fair, efficient, effective.

Cleanup the stuff—that is what we are up to. We are not in it for all sorts of social programs with regard to victims' compensation and every other known aspect of social reform. We are trying to get the people that did it to clean it up. We ought to keep our eye on the rabbit—that is it; that is what it is about—and do it in a way that does not take 40 percent of the cleanup money and dump it into prestigious law firms around the United States.

That is not what we are up to, and that is exactly where we are right now with Superfund. Do something that is less costly and, for heaven's sake, if some corporation or offending unit—and we ought to slap them around; I have no problem about that at all—but if they cough up their share, then let them off the hook instead of keeping them up nights figuring out how to bring them in again by the nape of the neck and drum them again.

So if we can stay with those rather simplistic ideas, which I think you can say in English somewhere, let us be about that. That is why I think it is important that this be referred here, and let us look at the fundamental aspects of what we were trying to do and whether we can get there with less cost.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished Senator from Utah.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. I only have a couple of comments, and that is basically that the present law apparently is working fairly well because, as I understand it, the strict liability aspects of the present law are leading to negotiated settlements that have already led to, as I understand it, around $400 million in negotiated settlements, with many more on the horizon, or prospects on the horizon.

A lot of it is fostering voluntary cleanup, and I think that has been very effective. I want to look at this particular legislation to just see whether it is sound legally and whether we need it. So I will have some significant questions in this area; at least I think they are significant. And I look forward to listening to the witnesses this morning.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We will now begin the testimony, and before doing that, I would like to place in the record statements by the following Senators, who have asked that this be done: Senator Edward M. Kennedy, Senator Patrick Leahy, and Senator Paul Simon. Also I ask that a copy of S. 51 be placed in the record.

[The aforementioned material follows:]

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY, S. 51
THE SUPERFUND IMPROVEMENT ACT OF 1985, JUNE 7, 1985

THANK YOU MR. CHAIRMAN.

TODAY THE SENATE JUDICIARY COMMITTEE BEGINS HEARINGS ON A CRITICAL ISSUE -- ONE WHICH CONCERNS THE PRESERVATION OF OUR ENVIRONMENT, THE PROTECTION OF OUR HEALTH AND THE HEALTH OF OUR CHILDREN. I APPRECIATE THIS OPPORTUNITY TO VOICE MY SUPPORT FOR PROMPT REAUTHORIZATION OF A STRENGTHENED SUPERFUND ACT.

THE IMPROPER DISPOSAL OF HAZARDOUS WASTE HAS BECOME ONE OF OUR NATION'S MOST SERIOUS PROBLEMS. EVERY YEAR MILLIONS OF AMERICANS ARE BEING EXPOSED TO THE DANGERS POSED BY IMPROPERLY DISPOSED TOXIC WASTE FROM THE NEARLY 22,000 HAZARDOUS WASTE SITES ACROSS THE COUNTRY. EPA ESTIMATES THAT AT 546 OF THE MOST SERIOUS SITES, SIX MILLION AMERICANS LOCATED WITHIN THREE MILES OF TOXIC WASTE SITES ARE DRINKING CONTAMINATED GROUNDWATER AND NEARLY ANOTHER SIX MILLION ARE DRINKING CONTAMINATED SURFACE WATER.

I WAS PROUD TO SPONSOR THE SUPERFUND ACT OF 1980, BUT THAT WAS ONLY A FIRST STEP TOWARD CLEANING UP THE MOST DANGEROUS TOXIC WASTE SITES IN THE NATION. WE KNEW THAT FURTHER LEGISLATION WOULD BE NEEDED TO BROADEN THE ACT TO INCLUDE COMPENSATION FOR MEDICAL EXPENSES, A FEDERAL CAUSE OF ACTION FOR VICTIMS, AND AN INCREASED FUND ADEQUATE TO COME TO GRIPS WITH THE ENORMOUS THREATS POSED BY HAZARDOUS SUBSTANCES AND TOXIC SITES. INDEED WHEN THE ORIGINAL $6 BILLION SENATE BILL WAS REDUCED TO $1.6 BILLION, WE KNEW THAT "SUPERFUND" WAS A MISNOMER, AND THAT THE FUND WAS SERIOUSLY INADEQUATE.

EVEN AT THIS REDUCED LEVEL, HOWEVER, SUPERFUND PROVIDED A RAY OF HOPE, AND AN OPPORTUNITY TO DEFUSE SOME OF THE MOST DANGEROUS TICKING TOXIC TIME BOMBS. UNFORTUNATELY, THE REALITY HAS BELIED THE PROMISE. NEARLY FIVE YEARS LATER, ONLY 6 TOXIC WASTE SITES OF THE 812 LISTED FOR PRIORITY ACTION HAVE BEEN TOTALLY CLEANED UP WITH SUPERFUND MONEY. IN MASSACHUSETTS, OVER 20 SITES ARE ON THE SUPERFUND PRIORITY LIST AND NOT A SINGLE ONE HAS BEEN ENTIRELY CLEANED UP.

RECENTLY, THE RECORD OF SUPERFUND ENFORCEMENT IS MORE ENCOURAGING. EPA HAS BEGUN MORE VIGOROUS PURSUIT OF CONSENT AGREEMENTS WITH COMPANIES; IT HAS ALREADY NEGOTIATED OVER $400 MILLION IN PRIVATE PARTY SETTLEMENTS. IN 1983 AND 1984 EPA REFERRED 71 HAZARDOUS WASTE CASES TO THE DEPARTMENT OF JUSTICE FOR PROSECUTION -- ALMOST TWICE THE NUMBER OF THE PREVIOUS TWO YEARS -- AND THE DEPARTMENT FILED SUIT IN 66 OF THESE CASES.

WE MUST DO MORE THAN ENCOURAGE INDUSTRY TO COMPLY WITH THE LAW; WE MUST DEMAND IT. THOSE WHO POISON OUR DRINKING WATER AND ENDANGER OUR CHILDREN'S HEALTH ARE NO LESS GUILTY OF CRIMINAL ACTION THAN THE MUGGERS AND ROBBERS AND OTHERS WHO COMMIT VIOLENT CRIMES. AND THEY DESERVE A PUNISHMENT FOR THEIR CRIMES. IT IS NOT ENOUGH TO PASS LAWS PROTECTING THE PUBLIC FROM THE DANGERS OF TOXIC WASTE -- AND THEN LOOK THE OTHER WAY WHEN ENFORCEMENT IS NEGLECTED.

VICTIMS OF TOXIC WASTE SHOULD AND MUST BE GIVEN AN OPPORTUNITY TO SUE POLLUTERS FOR THE TRAGIC CONSEQUENCES OF ILLEGALLY DISPOSED

CHEMICALS. I HAVE MET MANY OF THOSE VICTIMS, WHOSE HEARTBREAKING STORIES I SHALL NEVER FORGET:

--ANNE ANDERSON OF WOBURN, MASSACHUSETTS LOST HER 11 YEAR OLD SON, JIMMY, TO LEUKEMIA IN 1981. AFTER HER SON'S ILLNESS WAS DIAGNOSED, MRS. ANDERSON DISCOVERED THAT HER CITY'S DRINKING WATER WELLS HAD BEEN CONTAMINATED WITH THE CARCINOGEN, T.C.E., AND THAT NINETEEN OTHER CHILDREN IN HER COMMUNITY HAD ALSO BEEN STRICKEN WITH LEUKEMIA.

--NOREEN DANLEY, OF LOWELL, MASSACHUSETTS LIVED NEXT TO A CHEMICAL DUMP SITE WHERE THOUSANDS OF LEAKING BARRELS POISONED THE SOIL AND CHOKING ODORS FOULED THE AIR. BOTH OF HER CHILDREN SUFFERED FROM RESPIRATORY PROBLEMS AND AFTER REPEATED MISCARRIAGES AND THE DEATH OF A NEWBORN CHILD, MRS. DANLEY WAS FORCED TO UNDERGO A HYSTERECTOMY.

--IN FAIRHAVEN, MASSACHUSETTS, JUNE DEBARROS' YOUNG SON WAS STRICKEN WITH LEUKEMIA, AS WERE A HALF DOZEN OTHER CHILDREN IN HER IMMEDIATE NEIGHBORHOOD. DESPITE THE DANGERS POSED BY PCBs IN THE HARBOR NEAR HER HOME, THE SITE IS STILL NOT CLEANED UP AND IS NOT EXPECTED TO BE FOR ANOTHER TWO YEARS.

THE STORIES OF THESE FAMILIES ARE NOT UNIQUE. THEIR TRAGEDIES ARE REPEATED THROUGHOUT COMMUNITIES ACROSS THIS COUNTRY.

CONGRESS MUST ACT, AND ACT QUICKLY, TO REAUTHORIZE THE SUPERFUND AT A LEVEL NECESSARY TO ADDRESS THESE LIFE-THREATENING SITES. THE AVERAGE CLEANUP OF ONE SITE ALONE IS BETWEEN $10

AND $20 MILLION; THERE ARE OVER 800 PRIORITY SITES ON THE EPA's NATIONAL PRIORITY LIST, WITH MANY MORE EXPECTED TO BE ADDED TO THE LIST.

WE CAN NO LONGER TOLERATE DELAY IN THE CLEANUP OF THESE SITES; WE CAN NO LONGER PERMIT VICTIMS TO GO WITHOUT COMPENSATION FOR THE DEVASTATING HEALTH EFFECTS ASSOCIATED WITH SUCH SITES.

WE MUST ALSO PROVIDE THE CENTERS FOR DISEASE CONTROL WITH ADDITIONAL RESOURCES TO CONDUCT COMPREHENSIVE STUDIES IN COMMUNITIES WHERE SITES ARE LOCATED. SUCH STUDIES ARE NOW INFREQUENT AND TOO LIMITED IN SCOPE TO IDENTIFY CAUSAL RELATIONSHIPS BETWEEN CHEMICALS AND DISEASE. RESEARCH INTO CHEMICALLY-INDUCED DISEASE MUST BE INCREASED DRAMATICALLY. OUR FAILURE TO DIAGNOSE SUCH HEALTH PROBLEMS MEANS THAT THEY GO UNDETECTED FOR YEARS, WHILE THE PUBLIC CONTINUES TO BE EXPOSED.

THE PRESERVATION OF OUR ENVIRONMENT AND THE PROTECTION OF THE PUBLIC HEALTH ARE RESPONSIBILITIES THAT TRANSCEND PARTISAN LINES. WE ALL SHARE A FUNDAMENTAL COMMITMENT TO ENSURE THAT ALL AMERICANS AVOID UNNECESSARY ILLNESS AND LIVE IN A CLEAN AND SAFE ENVIRONMENT -- FREE FROM DRINKING WATER TAINTED WITH CANCER-CAUSING CHEMICALS; FREE FROM AIRBORNE TOXINS, CHEMICAL LAGOONS, CONTAMINATED LANDFILLS, AND LEAKING SUNKEN BARRELS FILLED WITH POISON.

SO I HOPE THESE PARAMOUNT OBJECTIVES ARE KEPT IN SIGHT AS THE COMMITTEE PROCEEDS TO EXAMINE THE IMPACT OF S. 51 ON THE FEDERAL JUDICIAL SYSTEM. I AM CONFIDENT THAT THE SENATE WILL RECOGNIZE THE IMPORTANCE OF THIS LEGISLATION AND ACT TO STRENGTHEN ITS PROVISIONS.

STATEMENT OF SENATOR PATRICK LEAHY

JUNE 7, 1985

I HAVE ONLY TWO CONCERNS ABOUT THE REFERRAL OF S.51 TO THE JUDICIARY COMMITTEE. THE FIRST IS THAT WE DO ABSOLUTELY NOTHING TO DELAY THE REAUTHORIZATION OF SUPERFUND, AND THE SECOND IS THAT IN THE NAME OF FINE-TUNING THE PROVISIONS OF S.51, WE DO NOTHING TO CHANGE THE STRUCTURE OF THIS HISTORIC LEGISLATION.

WHILE I RESPECT THE PURPOSES OF THIS REFERRAL TO OUR COMMITTEE, AND I SHARE WITH OUR CHAIRMAN THE VIEW THAT DELIBERATION IS IN ORDER IN ALL OF THE MAJOR AREAS OF THE BILL CONFERRED TO OUR JURISDICTION -- THE ISSUES OF CONTRIBUTIONS, JUDICIAL REVIEW, PRE-ENFORCEMENT REVIEW, AND CITIZENS' SUITS -- THE HOUR IS VERY LATE AND THE NEED TO ACT IS VERY GREAT.

I HAVE NO OBJECTION TO EXAMINING THESE COMPLEX PROVISIONS, SOME OF WHICH MAY BENEFIT FROM FINE-TUNING BEFORE THEY BECOME THE LAW OF THE LAND. I COMMEND THE CHAIRMEN OF BOTH COMMITTEES FOR WORKING OUT AGREEABLE TERMS FOR A SEQUENTIAL REFERRAL, WHICH IS A VERY LIMITED ONE.

I THINK THAT THE WORK OF THE ENVIRONMENT AND PUBLIC WORKS COMMITTEE HAS BEEN EXCELLENT AND THAT THE CHANGES PROPOSED BY THIS LEGISLATION WILL MAKE REAL IMPROVEMENTS IN THE FAIRNESS OF SUPERFUND AND THE ADMINISTRABILITY OF THE LITIGATION ARISING UNDER IT.

THE BASIC PRINCIPLES OF LIABILITY UNDER SUPERFUND REFLECT THE COMPLEXITY OF THE INDUSTRIAL HISTORY THAT HAS CAUSED THE MONSTROUS HAZARDOUS WASTE PROBLEM THREATENING OUR FUTURE.

THE PRINCIPLES OF SUPERFUND ARE SOMETIMES PAINTED AS HARSH, AND THEY ARE NOT. THEY ARE REALISTIC AND FAIR, AND IF WE CRAFT S.51 CAREFULLY, IT CAN MAKE THEM EVEN BETTER.

I URGE MY COLLEAGUES TO REVIEW THE PROVISIONS OF THIS BILL WITHIN OUR JURISDICTION WITH CARE, AND THEN TO ALLOW IT TO PROCEED ON ITS WAY WITH DISPATCH.

SUPERFUND CORRECTS THE MISTAKES WE HAVE BURIED AND NEARLY FORGOTTEN. WE OWE IT TO THE GENERATIONS AHEAD NEVER TO FORGET AGAIN.

Opening Statement of Senator Simon

June 7, 1985

MR. CHAIRMAN: We are reviewing today what I feel are some of the most important provisions of the Superfund Bill. They are important not only because they set out the procedural rights of private parties subject to the Act, but also because they affect our ability to accomplish the basic goals of this legislation - the fastest practical possible clean-up of hazardous waste sites throughout the country.

We must be sure that this process is accomplished in a manner that is fair to all those who must participate in the clean-up efforts. In our concern for procedural fairness, however, we should not lose sight of the fact that Superfund exists to protect the health and welfare of every American. We must provide the courts and government agencies with adequate procedural tools and the flexibility to use those tools in a manner that fully safeguards the public interest.

I know from experience the ways in which apportionment of liability and other procedural questions can effect the viability of our efforts to clean up the environment. The Crab Orchard National Wildlif Refuge, located near the City of Marion, Illinois, and is owned by the U.S. Fish and Wildlife Service, contains one of the most contaminated waste sites in the country. Pollution levels at Crab Orchard may be as dangerous to human health as those found at Love Canal and Times Beach.

During my last term in the House, I was able to have the budget of the Fish and Wildlife Service amended to require the agency to expend all funds necessary to accomplish a complete clean-up of this site. Despite the fact that funding has been authorized, as of today's date, Mr. Chairman, clean-up has yet to begin. It has not begun because the Department of Justice is still negotiating a clean-up agreement with the Sangamo Weston Company of Atlanta, Georgia, whose subsidiary is largely responsible for the contaminants present at the site.

I feel strongly that clean-up of such a dangerous site should not have to wait for various federal agencies and private parties to complete the blame-fixing process. Common sense dictates that clean-up should proceed simultaneously with cost-apportionment negotiations. This is particularly true where, as will be the case with the Crab Orchard site, the federal government will in any case be responsible for the greatest portion of the clean-up costs.

I know that every member of this Committee desires that the provisions of the Superfund statute be enforced fairly and that they accomplish what they were designed to accomplish - the quickest possible removal of hazardous wastes from our environment. The recommendations this Committee will make on liability apportionment and the other procedural issues before us will determine to a significant degree how close we come to meeting those goals.

S. 11

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the Superfund Improvement Act of 1985.

TITLE I

INDIAN TRIBES

SEC. 101. (a) Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended.

(1) by striking "and" at the end of paragraph (31), striking the period at the end of paragraph (32), and adding a new paragraph as follows:

"(33) 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and";

(2) in paragraph (16) by striking "or" the last time it appears and by inserting before the semicolon at the end thereof the following: ", any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe".

(b) Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding at the end thereof the following: "In the case of remedial action to be taken on land or water held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe (if such land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph for assurances regarding future maintenance and cost-sharing shall not apply, and the President shall provide the assurance required by this paragraph regarding the availability of a hazardous waste disposal facility.".

(c) Section 104(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting "or Indian tribe" after the phrase "political subdivision thereof" both times that phrase occurs, and by inserting "or Indian tribe" after the phrase "political subdivision" both times that phrase occurs.

(d) Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended—

(1) in subsection (a) by inserting "or an Indian tribe" after "State";

(2) in subsection (f) by inserting after "State" the third time that word appears the following: "and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation:"; by inserting "or Indian tribe" after "State" the fourth time that word appears; by adding before the period at the end of the first sentence the following: ", so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe"; and by inserting "or the Indian tribe" after "State government";

(3) in subsection (i) by inserting "or Indian tribe" after "State" the first time it appears; and

(4) in subsection (j) by inserting "or Indian tribe" after "State" the first time it appears.

(e) Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended—

(1) in subsection (b) by inserting before the period at the end thereof the following: ", or by any Indian tribe or by the United States acting on behalf of any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation";

(2) in subsection (c)(2) by inserting "or Indian tribe" after "State";

(3) in subsection (f) by inserting "or Indian tribe" after "State"; and

(4) in subsection (i) by inserting after "State," the following: "and by the governing body of any Indian tribe having sustained damage to natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation,".

(f) Section 112(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as rewritten by this Act) is amended by adding before the period at the end of the proviso the following: ", nor against an Indian tribe until the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this subsection".

(g) Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding at the end thereof the following new section:

"INDIAN TRIBES

"SEC. 116. The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 103(a) (regarding notification of releases), section 104(c)(2) (regarding consultation on remedial actions), section 104(e) (regarding access to information), section 104(i) (regarding cooperation in establishing and maintaining national registries), and section 105 (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the national priority list).".

COMMUNITY RELOCATION

SEC. 102. (a) The second sentence of paragraph (23) of section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting after "not otherwise provided for," the phrase "costs of permanent relocation of residents where it is determined that such permanent relocation is cost effective or may be necessary to protect health or welfare," and by striking out the semicolon at the end thereof and inserting in lieu thereof a period and the following: "In the case of a business located in an area of evacuation or relocation, the term may also include the payment of those installments of principal and interest on business debt which accrue between the date of evacuation or temporary relocation and thirty days following the date the permanent relocation is actually accomplished or, if permanent relocation is formally rejected as the appropriate response, the date on which evacuation or temporary relocation ceases. In the case of an individual unemployed as a result of such evacuation or relocation, it may also include the provision of assistance identical to that authorized by sections 407, 408, and 409 of the Disaster Relief Act of 1974: *Provided,* That the costs of such assistance shall be paid from the Trust Fund;".

(b) Section 104(c)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting before "authorized by subsection (b) of this section," the phrase "for permanent relocation or".

ALTERNATIVE WATER SUPPLIES

SEC. 103. Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, is amended by striking the period at the end of paragraph (30) and inserting in lieu thereof a semicolon; and by adding after new paragraph (33) the following new paragraph:

"(34) 'alternative water supplies' includes, but is not limited to, drinking water and household water supplies.".

STATE CREDIT

Sec. 104. (a) Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by striking "The President shall grant the State a credit against the share" and all that follows down through the end of such section 104(c)(3) and inserting in lieu thereof the following: "In determining the portion of the costs referred to in this section which is required to be paid by a participating State, the President shall grant the State a credit for amounts expended or obligated by such State or by a political subdivision thereof after January 1, 1978, and before December 11, 1980, for any response action costs which are covered by section 111(a) (1) or (2) and which were incurred at a facility or release listed pursuant to section 105(8). Such credit shall have the effect of reducing the amount which the State would otherwise be required to pay in connection with assistance under this section.".

(b)(1) Section 104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new sentence: "For the purposes of the last sentence of subsection (c)(3) of this section, the President may enter into a contract or cooperative agreement with a State under this paragraph under which such State will take response actions in connection with releases listed pursuant to section 105(8)(B), using non-Federal funds for such response actions, in advance of and without any obligation by the President of amounts from the Fund for such response actions.".

(2) Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is further amended by adding the following sentence: "The President shall grant the State a credit against the share of costs for which it is responsible under this paragraph for any reasonable, documented, direct out of pocket non-Federal funds expended or obligated by the State under a contract or cooperative agreement under the last sentence of subsection (d)(1).".

FUNDING OF REMEDIAL ACTION AT FACILITY OWNED BY A STATE OR POLITICAL SUBDIVISION BUT OPERATED PRIVATELY

Sec. 105. Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended—

(1) by amending section 104(c)(3)(C)(ii) to read as follows:

"(ii) 50 per centum (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of the capital, future operation, and future maintenance costs of the response action relating to a release at a facility, primarily used for treatment, storage, or disposal, that was owned and operated by the State or a political subdivision thereof at the time of any disposal of hazardous substances in such facility. For the purpose of subparagraph (c)(ii) of this paragraph, the term 'facility' does not include navigable waters or the beds underlying those waters."; and

(2) by adding at the end thereof the following: "In the case of any State which has paid, at any time after the date of the enactment of the Superfund Improvement Act of 1985, in excess of 10 percent of the costs of remedial action at a facility owned but not operated by such State or by a political subdivision thereof, the President shall use money in the Fund to provide reimbursement to such State for the amount of such excess.".

SELECTION OF REMEDIAL ACTIONS

Sec. 106. Section 104(c)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended to read as follows:

"(4)(A) The President shall select appropriate remedial actions determined to be necessary to carry out this section which, to the extent practicable, are in accordance with the national contingency plan and which provide for cost-effective response. In evaluating the cost-effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

"(B) Remedial actions in which treatment which significantly reduces the volume, toxicity or mobility of the hazardous substances is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action, where practicable treatment technologies are available.

"(C) Remedial actions selected under this paragraph or otherwise required or agreed to by the President under this Act shall attain a degree of cleanup of hazardous substances, pollutants and contaminants from the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

"(D) No permit shall be required under subtitle C of the Solid Waste Disposal Act for the portion of any removal or remedial action conducted pursuant to this Act entirely onsite: *Provided*, That any onsite treatment, storage, or disposal of hazardous substances, pollutants or contaminants shall comply with the requirements of subparagraph (C).

"(E) Subject to the requirements of this paragraph, the President shall select the appropriate remedial action which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.".

STATE AND FEDERAL CONTRIBUTIONS TO OPERATION AND MAINTENANCE

Sec. 107. Section 104(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new paragraphs:

"(5) For the purposes of paragraph (3) of this subsection, in the case of ground or surface water contamination, completed remedial action includes the completion of treatment or other measures, whether taken onsite or offsite, necessary to restore ground and surface water quality to a level that assures protection of human health and the environment. With respect to such measures, the operation of such measures for a period up to five years after the construction or installation and commencement of operation shall be considered remedial action. Activities required to maintain the effectiveness of such measures following such period or the completion of remedial action, whichever is earlier, shall be considered operation or maintenance.

(7) "During any period after the availability of funds received by the Trust Fund under sections 4611 and 4661 of the Internal Revenue Code of 1954 or section 221(b)(2) of this Act, the Federal share of the payment of costs for operation and maintenance pursuant to paragraph (3)(C)(i) or paragraph (5) of this subsection shall be from funds received by the Trust Fund under section 221(b)(1)(B)."

SITING OF HAZARDOUS WASTE FACILITIES

Sec. 108. Section 104(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding the following new paragraph:

"(7) Effective four years after the date of enactment of this paragraph, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act with adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed."

COOPERATIVE AGREEMENTS

Sec. 109. Section 104(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by striking all of the existing paragraph (other than that added by this Act) and substituting the following:

(d)(1) Where the President determines that a State or political subdivision has the capability to carry out any or all of the actions authorised in this section, the President may, in his discretion, enter into a contract or cooperative agreement and combine any existing cooperative agreements with such State or political subdivision to take such actions in accordance with criteria and priorities established pursuant to Section 105(8) of this title and to be reimbursed from the Fund for the reasonable response costs and related activities associated with the overall implementation, coordination, enforcement, training, community relations, site inventory and assessment efforts, and administration of remedial activities authorised by this Act. Any contract made hereunder shall be subject to the cost-sharing provisions of subsection (c) of this section."

HEALTH-RELATED AUTHORITIES

Sec. 118. (a) Section 104(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting "(1)" after "(i)", by redesignating paragraphs (1), (2), (3), (4), and (5) as subparagraphs (A), (B), (C), (D), and (E), and by adding the following new paragraphs:

"(2) The Agency for Toxic Substances and Disease Registry shall provide consultations upon request on health issues relating to exposure to hazardous or toxic substances, on the basis of available information, to the Environmental Protection Agency, State officials, and local officials. Such consultations to individuals may be provided by States under cooperative agreements established under this Act.

"(3)(A) The Administrator shall perform a health assessment for each release, threatened release or facility on the National Priority List established under section 105.

Such health assessment shall be completed not later than two years after the date of enactment of the Superfund Improvement Act of 1985 for each release, threatened release or facility proposed for inclusion on such list prior to such date of enactment or not later than one year after the date of proposal for inclusion on such list for each release, threatened release or facility proposed for inclusion on such list after such date of enactment. The Administrator shall also perform a health assessment for each facility for which one is required under section 3005(j) of the Solid Waste Disposal Act and, upon request of the Administrator of the Environmental Protection agency or a State, for each facility subject to this act or subtitle C of the Solid Waste Disposal Act, where there is sufficient data as to what hazardous substances are present in such facility.

"(B) The Administrator may perform health assessments for releases on facilities where individual persons or licensed physicians provide information that individuals have been exposed to a hazardous substance, for which the probable source of such exposure is a release. In addition to other methods (formal or informal) of providing such information, such individual persons or licensed physicians may submit a petition to the Administrator providing such information and requesting a health assessment. If such a petition is submitted and the Administrator does not initiate a health assessment, the Administrator shall provide a written explanation of why a health assessment is not appropriate.

"(C) In determining sites at which to conduct health assessments under this paragraph, the Administrator of the Agency for Toxic Substances and Disease Registry shall give priority to those facilities or sites at which there is documented evidence of release of hazardous substances, at which the potential risk to human health appears highest, and for which in the judgment of the Administrator of such Agency existing health assessment data is inadequate to assess the potential risk to human health as provided in subparagraph (E).

"(D) Any State or political subdivision carrying out an assessment shall report the results of the assessment to the Administrator of such Agency, and shall include recommendations with respect to further activities which need to be carried out under this section. The Administrator of such Agency shall include the same recommendation in a report on the results of any assessment carried out directly by the Agency, and shall issue periodic reports which include the results of all the assessments carried out under this paragraph.

"(E) For the purposes of this subsection and section 111(c)(4), the term 'health assessments' shall include preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential for pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified contaminants and any available recommended exposure or tolerance limits for such contaminants, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure. The assessment shall include an evaluation of the risks to the potentially affected population from all sources of such contaminants, including known point or nonpoint sources other than the site or facility in question. A purpose of such preliminary assessments shall be to help determine whether full-scale health or epidemiological studies and medical evaluations of exposed populations shall be undertaken.

"(F) At the completion of each health assessment the Administrator shall provide the Administrator of the Environmental Protection Agency and each affected State with the results of such assessment, together with any recommendations for further action under this subsection or otherwise under this Act.

"(G) In any case in which a health assessment performed under this paragraph (including one required by section 3005(j) of the Solid Waste Disposal Act) discloses the exposure of a population to the release of a hazardous substance, the costs of such health assessment may be recovered as a cost of response under section 107 of this Act from persons causing or contributing to such release of such hazardous substance or, in the case of multiple releases contributing to such exposure, to all such releases.

"(4) Whenever, in the judgment of the Administrator, it is appropriate on the basis of the results of a health assessment, the Administrator shall conduct a pilot study of health effects for selected groups of exposed individuals, in order to determine the desirability of conducting full scale epidemiological or other health studies of the entire exposed population. Whenever in the judgment of the Administrator it is appropriate on the basis of the results of such pilot study, the Administrator shall conduct such full scale epidemiological or other health studies as may be necessary to determine the health effects for the population exposed to hazardous substances in a release or suspected release.

"(5) In any case in which the results of a health assessment indicate a potential significant risk to human health, the Administrator shall consider whether the establishment of a registry of exposed persons would contribute to accomplishing the purposes of this subsection, taking into account circumstances bearing on the usefulness of such a registry, including the seriousness or unique character of identified diseases or the likelihood of population migration from the affected area.

"(6) The Administrator shall conduct a study, and report to the Congress within two years after the date of enactment of the Superfund Improvement Act of 1985, on the usefulness, costs, and potential implications of medical surveillance programs as a part of the health studies authorized by this section. Such study shall include, at a minimum, programs which identify diseases for which an exposed population is at excess risk, provide periodic medical testing to screen for such diseases in subgroups of the exposed population at highest risk, and provide for a mechanism to refer for treatment individuals who are diagnosed as having such diseases.

"(7) If a health assessment or other study carried out under this subsection contains a finding that the exposure concerned presents a significant risk to human health, the President shall take such steps as may be necessary to reduce such exposure and eliminate or substantially mitigate the significant risk to human health. Such steps may include the use of any authority under this Act, including, but not limited to—

"(1) provision of alternative water supplies, and

"(2) permanent or temporary relocation of individuals.

"(8) In any case which is the subject of a petition, a health assessment or study, or a research program under this subsection, nothing in this subsection shall be construed to delay or otherwise affect or impair the authority of the President or the Administrator of the Environmental Protection Agency to exercise any authority vested in the President or such Administrator under any other provision of law (including, but not limited to, the imminent hazard authority of section 7003 of the Solid Waste Disposal Act) or the response and abatement authorities of this Act.

"(9)(A) The Administrator shall, within six months after the date of enactment of the Superfund Improvement Act of 1985, prepare a list of at least one hundred hazardous substances which the Administrator, in his sole discretion, determines are those posing the most significant potential threat to human health due to their common presence at the location of responses under section 104 or at facilities on the National Priority List or in releases to which a response under section 104 is under consideration. Within twenty-four months after enactment, the Administrator shall prepare a list of an additional one hundred or more such hazardous substances. The Administrator shall not less often than once every year thereafter add to such list other substances which are frequently so found or otherwise pose a potentially significant threat to human health by reason of their physical, chemical, or biological nature.

"(B) For each such hazardous substance listed pursuant to subparagraph (A), the Administrator shall assess whether adequate information on the health effects of such substance is available. For any such substance for which adequate information is not available (or under development), the Administrator shall assure the initiation of a program of research designed to determine the health effects (and techniques for development of methods to determine such health effects) of such substance. Where feasible, such program shall seek to develop methods to determine the health effects of such substance in combination with other substances with which it is commonly found. Such program shall include, but not be limited to—

"(i) laboratory and other studies to determine short, intermediate, and long-term health effects;

"(ii) laboratory and other studies to determine organ-specific, site-specific, and system-specific acute and chronic toxicity;

"(iii) laboratory and other studies to determine the manner in which such substances are metabolized or to otherwise develop an understanding of the biokinetics of such substances; and

"(iv) where there is a possibility of obtaining human data, the collection of such information.

"(C) In assessing the need to perform laboratory and other studies, as required by subparagraph (B), the Administrator shall consider—

"(i) the availability and quality of existing test data concerning the substance on the suspected health effect in question;

"(ii) the extent to which testing already in progress will, in a timely fashion, provide data that will be adequate to support the preparation of toxicological profiles as required by subparagraph (F) of this paragraph; and

"(iii) such other scientific and technical factors as the Administrator may determine are necessary for the effective implementation of this subsection.

"(D) In the development and implementation of any research program under this paragraph, the Administrator of the Agency for Toxic Substances and Disease Registry and the Administrator of the Environmental Protection Agency shall coordinate such research program implemented under this paragraph with programs of toxicological testing established under the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act. The purpose of such coordination shall be to avoid duplication of effort and to assure that the hazardous substances listed pursuant to this subsection are tested thoroughly at the earliest practicable date. Where appropriate in the discretion of the Administrator and consistent with such purpose, a research program under this paragraph may be carried out using such programs of toxicological testing.

"(E) It is the sense of the Congress that the costs of research programs under this paragraph be borne by the manufacturers of the hazardous substance in question, as required in programs of toxicological testing under the Toxic Substances Control Act. Where this is not practical, the costs of such research programs should be borne by parties responsible for the release of the hazardous substance in question. To carry out such intention, the costs of conducting such a research program under this paragraph shall be deemed a cost of response for the purposes of recovery under section 107 of such costs from a party responsible for a release of such hazardous substance.

"(F) Based on all available information, including data developed and collected on the health effects of hazardous substances under this paragraph, the Administrator shall prepare toxicological profiles sufficient to establish the likely effect on human health of each of the substances listed pursuant to subparagraph (A). Such profiles shall be revised and republished as necessary, but no less often than once every five years. Such profiles shall be provided to the States and made available to other interested parties.

"(10) All studies and results of research conducted under this subsection (other than health assessments) shall be reported or adopted only after appropriate peer review. Such peer review shall be conducted by panels consisting of no less than three nor more than seven members, who shall be disinterested scientific experts selected for such purpose by the Administrator on the basis of their reputation for scientific objectivity and the lack of institutional ties with any person involved in the conduct of the study or research under review. Support services for such panels shall be provided by the Agency for Toxic Substances and Disease Registry.

"(11) In the implementation of this subsection and other health-related authorities of this Act, the Administrator is authorized to establish a program for the education of physicians and other health professionals on methods of diagnosis and treatment of injury or disease related to exposure to toxic substances, through such means as the Administrator deems appropriate. Not later than one year after the date of enactment of the Superfund Improvement Act 1985, the Administrator shall report to the Congress on the implementation of this paragraph.

"(12) For the purpose of implementing this subsection and other health-related authorities of this Act, the President shall provide adequate personnel to the Agency for Toxic Substances and Disease Registry, which shall be no fewer than one hundred full time equivalent employees.

"(13) The activities described in this subsection and section 111(c)(4) shall be carried out by the Agency for Toxic Substances and Disease Registry established by paragraph (1), either directly, or through cooperative agreements with States (or political subdivisions thereof) in the case of States (or political subdivisions) which the Administrator of such Agency determines are capable of carrying out such activities. Such activities shall include the provision of consultations on health information, and the conduct of health assessments, including those required under section 3005(j) of the Solid Waste Disposal Act, health studies and registries.".

(b) Section 111(c)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended—

(1) by inserting "in accordance with subsection (n) of this section and section 104(i)," after "(4)"; and

(2) by striking "epidemiologic studies" and inserting in lieu thereof "epidemiologic and laboratory studies and health assessments".

(c) Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding at the end thereof the following new subsection:

"(n) For fiscal year 1985, not less than $18,000,000 and, for each fiscal year thereafter, not less than five per centum of all sums appropriated from the Trust Fund or $50,000,000, whichever is less, shall be directly available to the Agency for Toxic Substances and Disease Registry and used for the purpose of carrying out activities described in subsection (c)(4) and section 104(i), including any such activities related to hazardous waste stored, treated, or disposed of at a facility having a permit under section 3025 of the Solid Waste Disposal Act. Any funds so made available which are not obligated by the beginning of the fourth quarter of the fiscal year in which made available shall be made available in the Trust Fund for other purposes.".

(d) Section 3005 of the Solid Waste Disposal Act is amended by adding the following new subsection:

"(j) Exposure Information and Health Assessments.—(1) Beginning on the date nine months after the enactment of the Solid Waste Disposal Act Amendments of 1984, each completed application for a permit under subsection (c) for a landfill or surface impoundment shall be accompanied by information reasonably ascertainable by the owner or operator on the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit. [illegible] a minimum, such information must address—

"(A) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

"(B) the potential pathways of human exposure to hazardous wastes or constituents resulting from the releases described under subparagraph (A); and

"(C) the potential magnitude and nature of the human exposure resulting from such releases.

The owner or operator of a landfill or surface impoundment for which a completed application for a permit under subsection (c) has been submitted prior to such date shall submit the information required by this paragraph to the Administrator (or the State, in the case of a State with an authorized program) no later than the date nine months after such date of enactment.

"(2) The Administrator (or the State, in the case of a State with an authorised program) shall make the information required by paragraph (1), together with other relevant information, available to the Agency for Toxic Substances and Disease Registry established by section 104(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Whenever in the judgment of the Administrator of such Agency, the Administrator, or the State (in the case of a State with an authorized program), a landfill or a surface impoundment poses a substantial potential risk to human health, due to the existence of releases of hazardous constituents, the magnitude of contamination with hazardous constituents which may be the result of a release, or the magnitude of the population exposed to such release or contamination, the Administrator of the Agency for Toxic Substances and Disease Registry shall conduct a health assessment in connection with such facility in accordance with section 104(i)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and take other appropriate action with respect to such risks as authorized by section 104(b) and (i) of such Act.

"(3) Any member of the public may submit evidence of releases of or exposure to hazardous constituents from such a facility, or as to the risks or health effects associated with such releases or exposure, to the Administrator of the Agency for Toxic Substances and Diseases Registry, the Administator, or the State (in the case of a State with an authorised program).".

(e) Section 104(i)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by—

(1) striking "the Surgeon General of the United States" and inserting in lieu thereof "the Secretary of Health and Human Services";

(2) inserting in the second sentence thereof after "of said Agency" the following: "(hereinafter in this subsection referred to as 'the Administrator')";

(3) striking "chromosomal testing" in subparagraph (D) and inserting in lieu thereof "appropriate testing".

PUBLIC PARTICIPATION

Sec. 111. Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding at the end thereof the following new subsection:

"(j) Before selection of appropriate remedial action to be undertaken by the United States or a State or before entering into a covenant not to sue or to forebear from suit or otherwise settle or dispose of a claim arising under this Act, notice of such proposed action and an opportunity for a public meeting in the affected area, as well as a reasonable opportunity to comment, shall be afforded to the public prior to final adoption or entry. Notice shall be accompanied by a discussion and analysis sufficient to provide a reasonable explanation of the proposal and alternative proposals considered.".

LOVE CANAL PROPERTY ACQUISITION

Sec. . Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding a new subsection as follows:

"(k) In determining priorities among releases and threatened releases under the National Contingency Plan and in carrying out remedial action under this section, the Administrator shall establish a high priority for the acquisition of all properties (including nonowner occupied residential, commercial, public, religious, and vacant properties) in the area in which, before May 22, 1980, the President determined an emergency to exist because of the release of hazardous substances and in which owner occupied residences have been acquired pursuant to such determination.".

NATIONAL CONTINGENCY PLAN—HAZARD RANKING SYSTEM

SEC. 112. Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting "(a)" immediately following "105." and by adding the following at the end thereof:

"(b) Not later than twelve months after the date of enactment of the Superfund Improvement Act of 1985, the President shall revise the National Contingency Plan to reflect the requirements of such amendments. The portion of such Plan known as 'the National Hazardous Substance Response Plan' shall be revised to provide procedures and standards for remedial actions undertaken pursuant to this Act which are consistent with amendments made by the Superfund Improvement Act of 1985 relating to the selection of remedial action.

"(c) Not later than twelve months after the date of enactment of the Superfund Improvement Act of 1985 and after publication of notice and opportunity for submission of comments in accordance with section 553 of title 5, United States Code, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984. Such amendments shall assure, to the maximum extent feasible, that the hazard ranking system accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review. The President shall establish an effective date for the amended hazard ranking system which is not later than eighteen months after the date of enactment of the Superfund Improvement Act of 1985 and such amended hazard ranking system shall be applied to any site or facility to be newly listed on the National Priority List after the effective date established by the President. Until such effective date of the regulations, the hazard ranking system in effect on September 1, 1984, shall continue in full force and effect.".

STATE AND LOCAL GOVERNMENT LIABILITY

SEC. 113. Section 107(d) of the Comprehensive Environmental Response, Compensation, and Liability Act to 1980 is amended by inserting "(1)" after "(d)" and adding the following new language:

"(2) No State or local government shall be liable under this title for costs or damages as a result of nonnegligent actions taken in response to an emergency created by the release of a hazardous substance, pollutant, or contaminant generated by or from a facility owned by another person.".

CONTRACTOR INDEMNIFICATION

SEC. 114. Section 107(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting after paragraph (1) the following new paragraph and redesignating the succeeding paragraph accordingly:

"(2) The Administrator may, in contracting or arranging for response action to be undertaken under this Act, agree to hold harmless and indemnify a contracting party against claims, including the expenses of litigation or settlement, by third persons for death, bodily injury or loss of or damage to property arising out of performance of a cleanup agreement to the extent that such claim does not arise out of the negligence of the contracting party.".

DIRECT ACTION

SEC. 115. (a) Section 108 (c) and (d) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 is amended to read as follows:

"(c) In any case where the owner or operator is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code or where with reasonable diligence jurisdiction in the Federal Courts cannot be obtained over an owner or operator likely to be solvent at the time of judgment, any claim authorized by section 107 and 111 may be asserted directly against the guarantor providing evidence of financial responsibility. In the case of any action pursuant to this subsection, such guarantor shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if any action had been brought against the owner or operator by the claimant and which would have been available to the guarantor if an action had been brought against the guarantor by the owner or operator.

"(d) The total liability under this Act of any guarantor shall be limited to the aggregate amount which the guarantor has provided as evidence of financial responsibility to the owner or operator under this Act: *Provided*, That nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual or common law liability of a guarantor to its owner or operator including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim: *Provided further*, That nothing in this subsection shall be construed, interpreted or applied to diminish the liability of any person under section 107 or 111 of this Act or other applicable law.".

(b) Section 108(b)(2) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 is amended by adding the following: "Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this Act.".

VICTIM ASSISTANCE PROGRAM

SEC. 116. * * *.

FUND USE OUTSIDE FEDERAL PROPERTY BOUNDARIES

SEC. 117. Section 111(e)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting before the period a colon and the following: "*Provided*, That money in the Fund shall be available for the provision of alternative water supplies (including the reimbursement of costs incurred by a municipality) in any case involving groundwater contamination outside the boundaries of a federally owned facility in which the federally owned facility is not the only potentially responsible party.".

STATUTE OF LIMITATIONS

SEC. 118. Section 112(d) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended to read as follows:

"(d) No claim may be presented, nor may any action be commenced, under this title—

"(1) for the costs of response, unless that claim is presented or action commenced within three years after the date of completion of the response action;

"(2) for damages under subparagraph (C) of section 107(a), unless that claim is presented or action commenced within three years after the date on which final regulations are promulgated under section 301(c) or within three years after the date of the discovery of the loss and its connection with the release in question or the date of enactment of this Act, whichever is later; or

"(3) for any other damages, unless that claim is presented or action commenced within three years after the date of the discovery of the loss and its connection with the release in question or the date of enactment of this Act, whichever is later: *Provided, however*, That the time limitations contained in this paragraph shall not begin to run against a minor until he reaches eighteen years of age or a legal representative is duly appointed for him, nor against an incompetent person until his incompetency ends or a legal representative is duly appointed for him. No claim may be presented or action be commenced under this paragraph for any damages if, prior to the date of enactment of the Superfund Improvement Act of 1985, the statute of limitations which would otherwise apply under this paragraph has expired.".

JUDICIAL REVIEW

SEC. 119. Section 113(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended to read as follows:

"SEC. 113. (a)(1) Review of any regulation promulgated under this Act may be had upon application by any interested person in the Circuit Court of Appeals of the United States for the District of Columbia or in any United States Court of Appeals for a circuit in which the applicant resides or transacts business which is directly affected by such regulation. Any such application shall be made within one hundred and twenty days from the date of promulgation of such regulation, or after such date only if such application is based solely on grounds which arose after such one hundred and twentieth day. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

"(2)(A) If applications for review of the same agency action have been filed in two or more United States Courts of Appeals and the Administrator has received written notice of the filing of the first such application more than thirty days before receiving written notice of the filing of the second application, then the record shall be filed in that court in which the first application was filed. If applications for review of the same agency action have been filed in two or more United States Courts of Appeals and the Administrator has received written notice of the filing of one or more applications within thirty days or less after receiving written notice of the filing of the first application, then the Administrator shall promptly advise in writing the Administrative Office of the United States Courts that applications have been filed in two or more United States Courts of Appeals, and shall identify each court for which he has written notice that such applications have been filed within thirty days or less of receiving written notice of the filing of the first such application. Pursuant to a system of random selection devised for this purpose, and within three business days after receiving such notice from the Administrator, the Administrative Office thereupon shall select the court in which the record shall be filed from among those identified by the Administrator. Upon notification of such selection, the Administrator shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the Administrator, the record shall be filed in the United States

Court of Appeals which remanded such action.

"(B) Where applications have been filed in two or more United States Courts of Appeals with respect to the same agency action and the record has been filed in one of such courts pursuant to subparagraph (A), the other courts in which such applications have been filed shall promptly transfer such applications to the United States Court of Appeals in which the record has been filed. Pending selection of a court pursuant to subparagraph (A), any court in which an application has been filed may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed.

"(C) Any court in which an application with respect to any agency action has been filed, including any court selected pursuant to subparagraph (A), may transfer such application to any other United States Court of Appeals for the convenience of the parties or otherwise in the interest of justice.".

CLARIFICATION OF PREEMPTION LANGUAGE

Sec. 120. Section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by inserting after the first sentence thereof the following: "Nothing in this section shall preclude any State from requiring any person to contribute to a fund to pay (1) the costs of the non-Federal share or other State responsibilities under section 104(c)(2), or (2) the direct and indirect costs of response actions at facilities or locations where the President has not responsed under this Act or in addition to response actions taken under this Act, or, (3) any other management, enforcement, or administration activities related to response actions or other cleanup of hazardous substances or hazardous wastes.".

FEDERAL FACILITIES

Sec. 121. Section 115 of the Comprehensive Environmental, Compensation, and Liability Act of 1980 is amended by inserting before the period at the end thereof a colon and the following: "*Provided*, That with respect to a Federal facility or activity for which such duties or powers are delegated to an officer, employee or representative of the department, agency or instrumentality which owns or operates such facility or conducts such activity, the concurrence of the Administrator (and the responsible State official where a cooperative agreement has been entered into) shall be required for the selection of appropriate remedial action and the administrative order authorities of section 106(a) are hereby delegated to the Administrator".

ADMINISTRATIVE CONFERENCE RECOMMENDATION

Sec. 122. The Congress finds that Recommendation 84-4 of the Administrative Conference of the United States (Adopted June 29, 1984) is generally consistent with the goals and purposes of the Comprehensive Environmental Response, Compensation, and Liability Act of 1982, and that the Administrator should consider such Recommendation and implement it to the extent that the Administrator determines that such implementation will expedite the cleanup of hazardous substances which have been released into the environment.

AUTHORIZATION OF APPROPRIATIONS

Sec. 123. (a) Section 221 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 is amended by striking "as provided in this section" in subseciton (a); striking paragraphs (2) and (3) of subsection (b); and by striking subsection (c).

(b) Section 303 of the Comprehensive Environmental Compensation and Liability Act of 1980 is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"Sec. 303. (a) There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Emergency Response Fund for fiscal year—

"(A) 1981, $44,000,000,

"(B) 1982, $44,000,000,

"(C) 1983, $44,000,000,

"(D) 1984, $44,000,000,

"(E) 1985, $44,000,000,

"(F) 1986, $206,000,000,

"(G) 1987, $206,000,000,

"(H) 1988, $206,000,000,

"(I) 1989, $206,000,000, and

"(J) 1990, $206,000,000,

plus for each fiscal year an amount equal to so much of the aggregate amount authorized to be appropriated under subparagraphs (A) through (I) as has not been appropriated before the beginning of the fiscal year involved".

"(b) Transfer of Funds.—There shall be transferred to the Response Trust Fund—

"(1) one-half of the unobligated balance remaining before the date of the enactment of this Act under the Fund in section 311 of the Clean Water Act, and

"(2) the amounts appropriated under section 504(b) of the Clean Water Act during any fiscal year.

"(c) Expenditures From Response Trust Fund.—

"(1) In general.—Amounts in the Response Trust Fund shall be available in connection with releases or threats of releases of hazardous substances into the environment only for purposes of making expenditures which are described in section 111 (other than subsection (j) thereof) of this Act, as in effect on the date of the enactment of the Superfund Improvement Act of 1985, including—

"(A) response costs,

"(B) claims asserted and compensable but unsatisfied under section 311 of the Clean Water Act,

"(C) claims for injury to, or destruction or loss of, natural resources, and

"(D) related costs described in section 111(c) of this Act

"(2) Limitations on expenditures.—At least 85 percent of the amounts appropriated to the Response Trust Fund shall be reserved—

"(A) for the purposes specified in paragraphs (1), (2), and (4) of section 111(a) of this Act, and

"(B) for the repayment of advances made under section 223(c), other than advances subject to the limitation of section 223(c)(2)(C)."

The CHAIRMAN. Mr. Thomas, I believe you are the first witness. We are very pleased to have you with us and you may now proceed.

STATEMENT OF A PANEL CONSISTING OF: LEE M. THOMAS, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY GENE LUCERO, DIRECTOR, WASTE ENFORCEMENT PROGRAM; AND F. HENRY HABICHT II, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. THOMAS. Thank you, Senator. First, I recognize the committee's 5-minute rule. If possible, between Mr. Habicht and myself, if we could have a few minutes longer, we could try to lay out the basis, I think, of the existing program and the issues that you noted for the committee's consideration.

The CHAIRMAN. That will be all right. You and Mr. Habicht can handle it as you see fit.

Mr. THOMAS. Thank you, sir.

I have with me at the table, also, Mr. Gene Lucero, who is Director of our Waste Enforcement Program in EPA, to help us with answering the committee's questions.

Senator, let me first point out how important I think the private party cleanup component of the Superfund Program is, what progress we have made over the last 4 years in that component of the program, what we project for the next 5 years, and how important the issues that this committee is going to take up are to that effort.

First, under the Superfund Program, if you look at these charts, we have three basic actions we take at a Superfund site once we have identified it. If it is an immediate threat, we take a removal action to clean it up right away; that is the chart on the left.

You will see the blue is work we have done with the fund itself; the red is where we have private party-fund combined, and the green is private party cleanup only. Second is the engineering studies of the site, and third is the actual long-term cleanup program at our priority sites.

As you can see from this, we have taken action at nearly 700 sites. On the remedial side, the long-term cleanup, nearly half of it is being done by private parties. Let me show you what that means on the next chart, as far as sites where private parties are actually involved.

At almost 200 sites—a little more than 200 sites now—we have private party cleanup underway, either completed, currently underway, or under settlement agreement. That is either for long-term cleanup, the engineering study, or the actual removal.

As Senator Hatch mentioned, on the next chart you will see that that amount of cleanup actually amounts to nearly $500 million. You can see the growth in the number of sites where private parties are involved, as well as the growth in the amount of money involved in that cleanup, has been substantial, particularly during the last 2 years where we made some major modifications in the way we worked with private parties.

Now, let me turn and point out to you how important it is for the next 5 years that we maintain that kind of momentum. It is critical that the private party cleanup part of the Superfund effort be continued.

We have projected for the next 5 years, maintaining the kind of momentum we have got underway, the number of sites we think will be dealt with, that over $2.5 billion in private party cleanup will be accomplished through our enforcement program.

That means we will have over $4 billion in settlements during the next 5 years—$2.5 billion of completed work during that period of time by private parties. Put that together with the $5.5 billion we have requested under the Superfund, and we have an over $8 billion cleanup effort during that 5-year period of time. So you can see how much of a component the private party part of that issue is.

Now, there are several reasons that I think we have been able to establish this kind of momentum in private party cleanup under this program. One is, I think, because of the strict, joint and several liability provisions of the law.

What we find at these sites is a couple of things. One, generally, we have a difficult time finding records to establish who brought waste to sites, what the intent was of the people who actually transported the waste and operated the site, and what waste came from what place. It is often a soup once we get there, a mixture of numerous wastes.

The strict, joint and several liability, we find, is the only practical liability provision that we can use in trying to go forward and have the responsible parties move forward with cleanup. It is a major incentive; it is an extraordinary tool as far as enforcement is concerned. But we are facing an extraordinary problem at these sites with the cleanup.

It is important then, with that kind of extraordinary tool, that the government use it rationally and judiciously. That, I think, is the key component of what we have to do and what I think the Congress needs to do in giving us direction in how that tool should be used.

Over the last couple of years we have worked through a settlement policy which promotes settlement with private parties short of litigation, so they will go forward with cleanup in an equitable, judicious and fair manner. We use strict, joint, and several liability as the major tool that forces settlement, that promotes settlement, but we also incorporate provisions such as the opportunity for settlement, the opportunity for participation by private parties at the critical points as we move forward—the opportunity for them to do the engineering studies or to take the cleanup action themselves. The opportunity for us to settle for less than 100 percent of the cost of cleanup is incorporated into our settlement policy, using the fund as well as private party money where it is in the best interests of all parties to do that. We also provide the ability for small contributors—those with low-toxicity, low-volume waste—to actually settle early as opposed to going through the entire process with extensive litigation costs; and the ability to have good, sound releases, better releases for better remedies, as we end up a settlement at a site so there is some certainty for the private parties.

Now, we have incorporated those things into our settlement policy. However, I think that as the Congress works through reauthorization, it is important that Congress affirm to us that those are the appropriate directions for us to take in private party settlements.

I would suggest that affirming it by statutory language would be the appropriate direction that should be taken, and I would urge the committee to give some consideration to that. I do not feel that some kind of mandatory apportionment process would be a workable approach, and I fear that, in fact, we may end up delaying the cleanup process and taking away some of the incentives for settlement.

We tried an apportionment process in this program in the first 2 years. We tried a fair-share approach, we tried a voluntary cleanup approach, and it did not work. As a matter of fact, Congress, through a series of hearings, told us over and over they did not like the way we went forward with it.

We tried a different approach. We tried an approach where we have used a settlement policy, developed a settlement policy that we think promotes settlement and private party cleanup, but clearly makes the point that we will use our litigation tools. We will use the Superfund if we are not able to settle the case, and we will do it in an expeditious manner because our objective is to clean the site up as quickly and as effectively as we can, while giving the private parties an opportunity to do it if they want.

The final point I would make is on the citizen suit provision which you will review. I think that is a potentially very disruptive component of S. 51, the incorporation of a citizen suit provision. I think it might result, and may well result in major litigation, major delay, to the actual cleanup of these sites.

I think in the Superfund Program, the idea of saying that we have to meet mandatory schedules and nondiscretionary duties in the statute, as interpreted by a judge, in a program as complex and as difficult to manage as this on a site-by-site basis may well do more to delay the process of this program in cleaning up the sites than anything else that could be done.

So I strongly urge the committee to consider recommending or amending S. 51 to eliminate the citizen suit provision. That is not to say that we do not feel strongly that citizens should be actively involved in the cleanup. We have recommended incorporation into the statute of a mandatory requirement for us to involve citizens at sites, soliciting input, providing information to them, as we go through an entire site cleanup process.

The citizens around those sites are the ones that I think are most critical for involvement in a site process. I do not think we need the kind of citizen suit provision that is incorporated into S. 51 to have that done.

So in conclusion, Senator, reauthorization of Superfund is critical. Continuing the momentum for private party cleanup, we think, is a major element of that. We urge that the momentum we have established be continued and that the committee look at incorporating into the statute some of the direction which we have tried to embody in our settlement policy, which we think prompts and promotes that cleanup, as evidenced by the growth over the last 18 months to 2 years.

Thank you, Senator.

[The prepared statement follows:]

STATEMENT OF
LEE M. THOMAS
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JUNE 7, 1985

Good morning. I am Lee M. Thomas, Administrator of the United States Environmental Protection Agency. I am pleased to have this opportunity to be here today to discuss with you EPA's enforcement program under the Comprehensive Environmental Response, Compensation, and Liability Act -- the Superfund.

With me is Hank Habicht, Assistant Attorney General for Lands and Natural Resources, who will address specific enforcement-related provisions of S.51. Many of these same provisions are also found in the Administration's bill, S.494. I believe these amendments are essential to an aggressive and efficient cleanup program, one which utilizes private resources wherever possible to get the job done.

First, I want to focus on the success EPA has had during the past two years in getting private parties to undertake cleanup action voluntarily. We have seen substantial progress in private party response. We anticipate far more private participation in cleanups during the next five years.

In fact, between 1986 and 1990, we project private parties will begin nearly $4 billion worth of cleanup at hazardous waste sites. By 1990, they will have completed about $2.5 billion worth of cleanup. This level of activity complements the Administration's proposed $5.3 billion Superfund reauthorization.

Our success in promoting private party cleanup is the product of several factors:

o Effective use of Superfund's powerful liability provisions.

o Aggressive pursuit of enforcement remedies wherever feasible.

o Willingness to employ the Superfund as needed to protect human health and the environment from hazardous waste sites.

o Implementation of a settlement policy which promotes private-party cleanup.

Since I have been with EPA, first as Assistant Administrator in charge of the hazardous waste program and now as Administrator, I have worked hard to develop and carry out a strong Superfund enforcement program. I believe the most effective way of cleaning up the thousands of hazardous waste sites that blight our national landscape is to balance the Federal response and that of private responsible parties. Whenever possible, I believe private parties should do the cleanup work and pay for it.

Negotiated private party cleanups, then, are essential to the success of our national Superfund strategy. We want those companies responsible for contamination in the first place to take remedial steps. Where protection of human health and the environment require it, we do not hesitate to use the Fund for cleanup work. If necessary, we will use litigation to force private cleanup or recover our costs.

Aggressive enforcement of the law, including the use of strict, joint and several liability, is the very heart of our success in promoting private party cleanups. I admit that Superfund's liability provisions are extraordinary. But the hazardous waste problem in this country is also extraordinary.

Congress considered its approach carefully when it debated Superfund in 1979 and 1980. It decided that only a statute with tough enforcement tools could succeed in dealing with a problem of such magnitude. Our experience has proven that Congress was right.

I am greatly concerned that Congress is now considering amendments which could weaken Superfund's liability provisions by requiring the agency to apportion cleanup costs among responsible parties. This is no time to be tampering with the key features of our enforcement program.

I cannot stress enough that the purpose of Superfund is to clean up the nation's worst hazardous waste dumps. Using the law's enforcement tools, that is what we are doing.

During the next five years, EPA plans to begin cleanup work at approximately 1,000 national priority sites. We anticipate that responsible parties will undertake the work at some 350 of those sites. It is only through effective use of strict, joint and several liability that we will be able to accomplish this level of private party involvement in our priority cleanup program.

The Superfund enforcement program is one of the most efficient and effective in the Federal government. We are seeing real progress in getting sites cleaned up, and in recovering the costs we have incurred in doing the cleanups ourselves.

During the past several years, the Department of Justice has filed 75 civil actions seeking injunctive relief for site cleanup by responsible parties. An additional 49 cases have been filed where the government is seeking to recover its costs for Federally financed cleanup under Superfund. EPA has issued administrative orders requiring responsible parties to undertake cleanup at well over 200 sites.

While these statistics are indicators of an aggressive program, it is the actual results of our enforcement actions which demonstrate effectiveness. That translates to dollars and actual cleanup. Through fiscal year 1984, the Superfund enforcement program obtained private party settlements for cleanup worth $329.5 million. So far this year, that cumulative total has grown by more than $100 million. More is expected as the pace of both the enforcement and cleanup programs accelerates.

The Importance of Powerful Liability Standards

The liability standards established under Superfund have been the keys to EPA's success in obtaining substantial private party cleanup at hazardous waste sites. The courts have established as a matter of Federal common law that the liability of potentially responsible parties at Superfund sites is strict, joint and several, unless the responsible parties can demonstrate that the harm is divisible.

Strict liability holds parties liable irrespective of their intent. Joint and several liability provides that, where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Where the harm is divisible, so is the liability.

It is the knowledge that they can be held jointly and severally liable for full cleanup that gives responsible parties the impetus to negotiate settlements for cleanup when the harm at a site is indivisible. Without this powerful tool, incentives for delay while parties quibble over the particulars of individual contribution at the site may outweigh the real priority -- getting on with the job of cleanup.

In addition to being a powerful tool, joint and several liability is also a very practical mechanism in achieving site cleanup by private parties. Most Superfund sites constitute environmental harm that is truly indivisible. Wastes are frequently intermixed. Even if they were originally segregated, they have become intermingled with the soil, groundwater, and surface water.

Site records are frequently deficient. It is often difficult to determine with any certainty who sent wastes to the site, what the wastes were and in what quantities, and where they were placed. Dozens and even hundreds of parties may have been involved.

Critics of joint and several liability under Superfund contend that, in theory, the government could sue the generator of a single drum of waste found at a massive site for the entire cleanup of that site. In practice, however, this does not happen. First of all, we negotiate with all interested responsible parties, regardless of their size or contribution to the site. In practice, this means we are negotiating settlements with anywhere from 1 or 2 parties to over 250 parties at some sites.

When negotiations fail, the government will sue a substantial group of responsible parties. In the majority of cases filed, the named defendants include owners and operators and contributors of about 65-100% of the waste at the site. Selection of defendants is based on contribution of waste at a site (both type and volume), strength of evidence, and the financial viability of a party.

Unless government employs joint and several liability in a rational and consistent fashion, the courts may be unwilling to apply it in Superfund cleanup cases. Responsible parties also have an opportunity to show that their contribution to the problem at the site is divisible and therefore not subject to the joint and several liability standard.

In addition, Section 106 of the Superfund law specifies that courts should grant such relief as the public interest and the equities of the case may require. In assessing settlement proposals, EPA considers aggravating and mitigating circumstances and other appropriate equity factors.

It is important to remember that a strong enforcement program and substantial involvement of responsible parties in site cleanup are critical elements in the Administration's Superfund reauthorization proposal. Continued expansion of this effort will supplement the $5.3 billion fund-financed cleanup we have put forward.

Implementation of the Superfund Enforcement Program

EPA's enforcement program has worked effectively in recent years. To make it work even better, EPA and the Justice Department have developed a settlement policy for dealing with parties willing to take on their part of the cleanup burden. The policy facilitates settlements with private parties and addresses many of the concerns raised with Superfund's liability scheme. I want to highlight four particular aspects of the policy:

o opportunity for settlement.

o settlements for less than 100% and mixed funding.

o settlements with de minimis parties.

o releases from liability.

Opportunity for Settlement

The prospect of litigation or Fund-financed cleanup is essential to provide responsible parties with incentives to negotiate for cleanup. The Agency also provides responsible parties with opportunities to settle before litigation and pretrial costs are incurred.

Our settlement policy identifies a number of stages in the CERCLA Cleanup process that give responsible parties an opportunity to take over or pay for CERCLA cleanup before litigation begins.

o The Agency identifies and notifies responsible parties of their potential liability under CERCLA.

o The Agency provides responsible parties with information on the identity of other responsible parties and the volume and nature of wastes disposed at the site.

o The Agency offers responsible parties an opportunity to perform or participate in the studies leading up to the choice of remedy.

o Once the proposed remedy for the site has been identified, the Agency gives responsible parties a formal opportunity to make offers for cleanup action, before enforcement or

Fund-financed cleanup would begin. In considering these offers, EPA makes a pragmatic assessment of whether acceptance of the settlement offer would expedite cleanup.

Upon settling with cooperative parties, the government will vigorously seek all remaining relief from the parties whose recalcitrance made a complete settlement impossible. The government will select parties for litigation to involve the largest manageable number of parties from the site.

Settlements for Less Than 100% and Mixed Funding

The settlement policy provides flexibility for assessing responsible party proposals for cleanup. It explicitly states that the agency will consider offers for less than 100% of cleanup or the costs of cleanup. In addition, we anticipate that both the Fund and private resources may be used at the same site in some circumstances. Where the agency settles for less than 100% of cleanup costs, it can use the Fund to assure that site cleanup proceeds expeditiously and then sue to recover these costs from non-settling responsible parties. If the Federal government accepts less than 100% of cleanup costs and no financially viable responsible parties remain, Superfund monies may be used to make up the difference.

This approach is fully consistent with joint and several liability. The government is making a pragmatic assessment of whether settlement for less than 100% will expedite cleanup, regardless of liability. The settlement policy sets out a number of criteria to be used in considering an offer for less than 100% of cleanup. They include the nature and volume of wastes at the site, ability of parties to pay, the nature of the evidence available, the need for expedited cleanup, the nature of the case remaining against non-settling parties, and inequities and aggravating factors. If the government determines on the basis of such criteria to accept an offer for less than 100% of cleanup costs, it can then make a determination of whether mixed funding is useful to expedite cleanup. Mixed funding will involve reimbursement from the Fund, rather than advance payment to responsible parties.

The agency will not apportion costs among responsible parties. Such a system would delay cleanup, be complex to administer, and increase the chance of litigation without resolving any questions of fairness among responsible parties.

Small Contributors

Small contributor parties have argued that they cannot settle their liability with the Agency without becoming involved in extensive negotiations with other responsible parties. In such situations, their legal costs may be disproportionately large in comparison with their contribution to the problems at a site. Whether or not they are targeted for litigation by the Federal government, they may be brought into a case by other responsible parties as third party defendants. In this setting they are also likely to incur disproportionate legal costs.

The settlement policy authorizes negotiations and settlements with small contributors, even when offers from these parties do not constitute a substantial portion of the costs of cleanup. The policy provides that, in negotiating with small contributors, the Agency should limit its efforts to low volume, low toxicity disposers who would not normally pay a significant portion of the costs of cleanup.

The contribution protection amendment in S.51 would also benefit small contributors. If they are parties to a good faith, judicially approved settlement, they would not be subject to contribution actions by other responsible parties sued by the Agency.

Releases from Liability

Responsible parties who offer to clean up sites generally want to negotiate a release from liability as part of the settlement. Responsible parties frequently want some certainty in return for assuming the costs of cleanup, and we recognize that releases will provide some certainty and be a valuable incentive for private party cleanup. On the other hand, we also recognize the current state of scientific uncertainty concerning the impacts of hazardous substances, our ability to detect them, and the effectiveness of different types of remedies at hazardous waste sites. It is possible that remedial measures will prove inadequate at some sites because of limitations on our current scientific understanding, unknown conditions, or failures in the design and construction of the remedy.

Our settlement policy provides for releases from liability under the general principle, "the better the remedy, the better the release." The language does not include any specific hierarchy of approved remedies. Instead, it provides the flexibility to reflect changes and improvements in our scientific understanding of hazardous waste management.

Requests for releases are assessed on a site-specific basis, in light of the alternatives considered for the cleanup. Releases are more likely to be appropriate where the chosen remedy is the most environmentally protective alternative that is economically feasible at the site. The policy therefore does not indicate whether parties disposing wastes off-site at RCRA-permitted or regulated facilities will automatically be granted releases. In some cases, off-site disposal may be the most environmentally protective alternative that is economically feasible; in others, alternatives such as treatment or destruction may be feasible.

At present, this settlement policy provides guidance on implementation of the enforcement program on the matters that I have just discussed. I believe that the policy provides flexibility and fairness in the application of joint and several liability. I will work with you to incorporate appropriate provisions of the settlement policy into the statute to maintain an aggressive and successful program, based on the current liability standard, that can be applied consistently and fairly across the country.

Drawbacks to Changes in the Liability Standards of CERCLA

As I indicated earlier, we are opposed to mandatory apportionment schemes that have been suggested as substitutes for the liability standards established under CERCLA. Apportionment of costs should be conducted by responsible parties in developing proposals for cleanup, or by courts after the liability of responsible parties has been determined. Mandatory apportionment schemes that would require the Agency to identify each responsible party's share of the cost of cleanup before it could negotiate with or litigate against these parties would severely impair the effectiveness of the CERCLA enforcement program.

Substituting an apportionment scheme for the strict, joint and several liability scheme established by the courts under the existing statute would delay cleanups and increase the costs involved in reaching settlements and taking enforcement actions.

The specific drawbacks of such a scheme are:

- It would reduce incentives for negotiation and increase the chance of litigation.
- It would be complex to administer.
- It would not adequately address the question of fairness among responsible parties.

Under joint and several liability as interpreted by the courts, responsible parties can apportion costs among themselves, or attempt to demonstrate to the court's satisfaction that the costs are divisible. Courts may also apportion costs following an adjudication of liability and a determination that parties are jointly and severally liable. A mandatory apportionment scheme would instead require the Federal government to apportion the cost of cleanup among parties, or between responsible parties and the Fund, before the Agency could commence enforcement action.

Apportionment Would Have A Severe Impact on Negotiations

EPA would have to determine the appropriate share of cleanup costs for each responsible party at a site before it could negotiate with responsible parties or litigate for cleanup. The government would then have to negotiate with each party individually. Fund cleanups would also be costlier and slower because of the need to obtain the additional evidence for cost recovery actions.

Apportionment discourages cooperation among responsible parties. Under joint and several liability, the government negotiates with potentially responsible parties as a group. The incentive to reach collective settlement would be virtually destroyed if each party could not be held liable for more than a specific predetermined share.

Rather than assuming the responsibility for cleanup and negotiating the costs among themselves, responsible parties would instead litigate with the government concerning the general fairness of the apportionment scheme and the specific facts concerning its application to them.

If the maximum potential liability of the responsible parties is established by the government through an apportionment scheme, then responsible parties will have little incentive to settle and a lot of incentive to litigate. There is little reason to accept a percentage of costs in settlement negotiations, if the worst possible outcome after litigation is that the same percentage of costs would be imposed by the courts. Under joint and several liability, responsible parties have an incentive to settle, because courts may impose a greater proportion of costs as a result of litigation.

Administration of the Program Would Be Much More Complex Under Apportionment Schemes

No single factor is likely to be adequate for apportioning costs among responsible parties. Apportionment schemes suggested for CERCLA have generally involved a mix of factors, such as volume of waste, degree of toxicity, costs for cleanup of particular wastes, and a number of other possibilities.

Development of apportionment criteria for assessing such factors as the degree of toxicity or hazardousness of waste are likely to be the subject of intense criticism by responsible parties.

The government would be required to make a number of additional factual showings. For example, it would be under a much more difficult burden to show who put what substances where, whether particular substances migrated, and where they migrated to, the cost of cleaning up particular substances, and the toxicities of particular substances, both alone and in conjunction with other substances at the site.

EPA resources would be diverted from identifying the appropriate remedy and overseeing cleanup, and would be instead devoted to performing economic allocations among responsible parties and to carrying out investigations designed for litigation needs.

Apportionment Systems Will Not Result in a Fair Process for Determining the Responsibilities for Cleanup

Our experience with responsible parties apportioning costs among themselves at sites is that they initially disagree among themselves as to what methods are fair. Eventually, they negotiate a consensus among themselves. It is not likely that they will view an apportionment scheme imposed by the government as more fair than one which they develop themselves.

Determinations of fairness are highly subjective, and no single apportionment scheme is likely to be acceptable to all parties. For example, contributors of low-volume, high-toxicity waste are likely to favor a volumetric approach, while contributors of high volumes of comparatively innocuous wastes are more likely to object to it.

In short, we believe that the existing CERCLA liability scheme, which allows responsible parties to negotiate apportionment questions among themselves, is much more fair and efficient than a mandatory apportionment scheme that encourages complex litigation to resolve these questions.

In addition, joint and several liability, is a powerful incentive for effective management of hazardous substances. Joint and several liability means that financially sound generators cannot limit their risk of liability by transferring wastes to transporters or disposers who may lack the financial capability or willingness to dispose the wastes properly. The generators remain responsible for the wastes, so they have a strong incentive to arrange for proper disposal and to limit the wastes that they generate. If joint and several liability is abolished under Superfund, then generators will lose this incentive and assuring compliance with the Resource Conservation and Recovery Act will become more difficult. In addition, generators will lose this incentive for developing innovative and alternative methods for limiting wastes generated, and for disposing of wastes.

Citizen Suit Provisions

Finally, we have serious misgivings concerning the citizen suit provisions in S. 51. These provisions authorize suits against persons, including Federal agencies, alleged to be in violation of standards, regulations, requirements or orders that have become effective under Superfund, and suits against the President for failure to perform nondiscretionary acts or duties.

More generally, the duties of the President that are potentially subject to citizen suit are not clearly identified. A court may interpret virtually any action under the statute as non-discretionary. In addition, there have been suggestions that the statute should be amended to add a considerable number of mandatory duties, including petitions for listing sites and petitions for health studies -- both with deadlines for Agency actions, listing sites, mandatory schedules for cleanups, and mandatory cleanup standards. Alleged failure to perform these mandatory duties would subject the Agency to a suit.

Under these circumstances, the citizen suit provision will have the potential to create massive disruption in the program as we pull resources away from our priority cleanup actions and use them to respond to citizen suits. They could embroil the Agency in litigation to defend itself, pulling its resources away from its primary objective, that of environmental protection. We believe that cleanups can be accomplished more quickly without them.

In addition, citizen suits to enforce the mandatory deadlines proposed for Superfund compliance at Federal facilities could delay the pace of cleanup at these facilities. Any provision affecting Federal facility cleanup must reflect the basic differences between Federal programs and private sector cleanups. The pace of Federal facility cleanups is determined by management capability, the lead time needed to identify appropriate remedies, and necessary resources. Citizen suits intended to push cleanup action for these facilities will merely generate litigation costs, divert resources from cleanup activity, and produce cleanup of lower priority sites before higher priority sites.

In closing, I believe that private party cleanup under Superfund can be accomplished most effectively under the existing liability scheme and enforcement process, with the refinements that I have discussed today. Changes in the liability standards and process would lead to massive delays and costs that would disrupt the pace of cleanup that we have established.

Thank you.

The CHAIRMAN. Thank you.
Mr. Habicht.

STATEMENT OF F. HENRY HABICHT II

Mr. HABICHT. Thank you, Mr. Chairman, Senator Simpson, Senator Hatch. Mr. Thomas continues to protest that he is not a lawyer, but he sure gets to the point a lot better than most lawyers do.

I appreciate the chance to testify before the committee, Mr. Chairman. I very much appreciate, and I echo Senator Simpson's sentiments, that there are very difficult issues. Lee Thomas and I would be the first tc admit that the issues that the committee has identified for consideration are extremely difficult issues.

It is important that they be viewed in the context of the real world of our experience with Superfund implementation over the last 4 years. I think Lee Thomas has adequately demonstrated the importance of enforcement to making this program work—the importance of getting private parties in to help with the cleanup task so this is not a big public works program, and so we get the resources of the private sector, the people who are responsible for causing the problem, applied to this important job.

The question then is, in this kind of difficult context, what is the most effective, fair and disciplined way of approaching the task of enforcement. There have been extensive legal rules that have been developed over the last several years. We have had many discussions among ourselves and with industry groups and committee staff over the last year, and particularly over the last several months, to find out, first, how the program can keep moving forward and second, how we can make incremental changes to the legal rules that are in place to make the program operate more rationally and fairly.

What I would like to do very briefly, Mr. Chairman, is to outline current law and how it operates in the enforcement context, and then describe our efforts to rationalize the law along the areas that the committee has identified: first, discussing the liability rules; second, discussing the provisions regarding contribution; third, the provisions regarding record review; and, finally just a note on citizen suits to amplify what Mr. Thomas has already very clearly stated.

The current law is as follows: the liability scheme under current law is a rule of strict joint and several liability, as announced by the courts. No express right of contribution exists in the statute, and no review of EPA orders or implementation activities may occur to litigation initiated by the Government. That is the state of current law.

As Lee Thomas discussed, the thrust of the program is to try to avoid litigation, to try to get these sites resolved without having to go into court. But, obviously, we have to provide for a rational scheme for people who do not want to settle and who do want to litigate their interests.

The theory behind the liability rule is if you have a waste site that presents an ongoing threat of harm to the public—the kind of threat that EPA determines needs to be resolved through remedial action—the parties contributing to the problem that needs to be cleaned up are strictly liable for that remedial activity.

If the harm at the site is divisible, joint and several liability would not apply. If the harm is not divisible, then joint and several applies. The purpose behind joint and several liability is not to punish; it is not to be punitive.

It is based on a very practical recognition, as Lee Thomas indicated, that at these sites we have very poor records and leaking, mixed hazardous waste situations. The Government should not be put to the impossible burden of proving precisely who sent what. The shares probably can never be determined with certainty.

So joint and several liability in the context of Superfund, in our view, is not a punitive measure; it is a burden-shifting device to allow litigation to move forward expeditiously from the standpoint of enforcement litigation. It give the parties—obviously, it is important for the parties to have a chance to allocate liability among themselves.

In practice, let us look at a section 106 case, which is a case in which we are seeking cleanup activity by private parties through an action for an injunction. The Government must show that there has been a release of hazardous substances at the site that may present an imminent and substantial endangerment to public health and the environment. Without that showing, we cannot go forward under section 106.

If that showing is made, then we must show that the named defendants have in fact contributed to the problem that needs to be cleaned up. The liable parties under section 107 of the statute are the owners and operators of the site, the people who transported waste to the site, and the generators of the wastes that are found at the site.

If we show the factual connection between the potentially responsible parties and the problem that needs to be cleaned up at the site, the defendants then have the opportunity to show that the harm is divisible or to raise appropriate defenses to liability.

If liability is established, we move to a trial of the remedy, and then the responsible parties, we believe, would move to an apportionment action, though as I indicated, the current law does not expressly provide for a right of contribution.

Because there are so many fact situations at these sites, Congress established a broad list of potentially responsible parties under the statute. But in our view, Congress clearly expects enforcement to be governed by a sound notion of prosecutorial discretion. We have the obligation not to sue parties who are only marginally related to the site.

We equally have the obligation to sue the most significant parties who contributed to the problem at the site. Therefore, in every case, we seek out, as Lee Thomas indicated, the most significant contributors of waste by volume, and also the most significant owners, operators and transporters of waste to the site.

There are two fundamental reasons why we do that, why we seek a critical mass of parties in any lawsuit that we bring. The first reason is that we believe Congress intended that joint and several liability be applied rationally and fairly. Because it is not punitive, we would not seek to impose 100 percent liability on a truly minor contributor.

The second reason is a practical one and absolutely central to our purpose of getting settlements; that is, if we sue too few parties, we are not going to have the proper incentives to have those parties propose a settlement of the case. That is the notion of critical mass in the lawsuits.

So the goal is to apply joint and several liability rationally. This rational application, by getting a substantial group of parties in each lawsuit, has worked, as Senator Hatch has indicated. We have procured very significant settlements at a rate which is rapidly increasing well over $300 million already, with quite a few settlements on the horizon.

So against this backdrop of existing law, we are seeking, through the settlement policy that Lee Thomas described and through legislative amendments, to rationalize the existing legal standards, to build on the program to provide incentives for settlement, to rationalize the litigation process, and to regularize the administrative process that precedes litigation.

How do we do this? First, with regard to joint and several liability, as I have said, joint and several should not and cannot, I believe, be abused. One way to address this, as Lee Thomas indicated, is for Congress to encourage the Administrator to use the fund in his judgment to augment appropriate private party settlement proposals, that is, to build up shares to cover the entire cleanup when parties come forward with a substantial settlement proposal, particularly when parties come forward early, before litigation.

Congress might provide general guidance as to the importance of not abusing joint and several liability, for example, in legislative history. We are very interested in working with this committee on provisions of this nature. We have also proposed provisions that go toward the goals that I have just described.

First, section 126, of S. 51 rationalizes and softens the blow of joint and several liability in three ways. First of all, without the right of contribution, joint and several liability would truly be oppressive and unfair.

Therefore, we want to provide expressly the right of responsible parties to seek contribution. We go beyond that, second, and provide for some sense of finality and an end to litigation through offering contribution protection, which is not expressly available under existing law. This way, when parties settle, they are protected from further liability from contribution suits by parties who have not settled. This provides an important degree of finality and an end to litigation.

Finally, we provide for a logical sequence of litigation. Litigation would proceed as I have described, with the case in chief establishing liability so that we have parties who are appropriately before the court. Then we immediately try the issue of remedy. Is the remedy appropriate? And then we would immediately move to a contribution or an equitable apportionment kind of proceeding.

The obvious reason for this litigation sequence is that it is very difficult to apportion until you know what the pie is that you are splitting up; that is, you have to determine remedy before apportionment proceeds.

This third phase, this equitable apportionment phase, would involve issues that would not be significantly duplicative of the issues that would be tried initially. Overall, it would be a rational process and would be one that could move quickly.

Now, in S. 51, the contribution provision says that third-party claims cannot be brought until after the Government's case in chief is completed. We recognize the leverage that rule 14 provides to defendants, and it is important leverage for settlement. Therefore, the Department and the EPA support—and we are going through the administration review process—a revision to section 126 in S. 51 that would make clear that parties can, under rule 14, bring third-party complaints immediately during the action in chief, and only the hearing of those claims would be put off until after the remedy is determined. But all parties in the litigation would be able to participate in the trial of remedy, if they are interested in that.

Turning ~~to~~ section 133, section 133 has the principal purpose of ensuring more formal procedural protections to responsible parties and the public early in the process when it counts, when EPA is selecting the remedy.

We propose providing for the creation of an administrative record and a regularized public participation process before the remedy is selected so that all the parties' interests and comments would be developed and put on a record when it counts, up front.

The parties would still have a day in court. As I noted earlier, under existing law any review of EPA actions is not available until after EPA brings an enforcement action of some sort.

But it is important that parties have a day in court before their liability becomes fixed. The timing of review is significant because of the possibility of important remedial actions being stayed, but the right of review and the substantive issues that would be addressed would be the same. Judicial review would be at a time before the parties' liability becomes ultimately fixed.

They would be able to try their liability de novo. The review of the remedy, as in other similar administrative record situations, would be on the record, but only if that record were a complete and adequate record.

Again, our objective is to promote voluntary cleanups and to make the process as rational as possible, while making sure, as Lee Thomas indicated, that it is effective. In this effort, we want to minimize any unnecessary litigation that does not contribute to the goals of the statute.

I would just underscore Lee Thomas' strong concern about adding additional rights of action in the area of Superfund implementation. We have very significant concerns about any new rights of action, as this committee, I know, always does in any context, but particularly in this context which is fraught with highly technical and emotional issues.

Any new right of action will certainly be used and will lead to extremely burdensome litigation without a clear purpose or benefit. Section 138 of S. 51 raises many concerns, as Lee Thomas has described and as we have already described in our testimony. There is also the concern about pendent claims and other tangential issues that would slow up the Government's enforcement process and that would lead to unnecessary judicial second-guessing of extremely technical and difficult kinds of remedial decisions.

I appreciate the committee's indulgence. I have taken a bit of additional time. We wanted to set forth how we view the enforcement process working and our motive in keeping the process moving forward, but also to explain that we are indeed looking for incremental kinds of changes that will make it more rational and fair.

We are very interested in knowing the committee's thoughts on these issues. Thank you.

[The prepared statement follows:]

STATEMENT OF F. HENRY HABICHT II
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JUNE 7, 1985

Mr. Chairman, members of the Committee, I am pleased to have this opportunity to discuss with you S. 51, the Superfund Improvement Act of 1985. As you know, S. 51 incorporates several provisions from the Administration's CERCLA reauthorization proposal, including some enforcement-related provisions that we believe would significantly increase both the efficiency and the fairness of the Superfund program. The bill also includes, and I would also like to discuss, certain provisions that the Administration opposes and that we believe would be extremely detrimental to the program. We are very interested in the Committee's perspective on these important issues and look forward to working closely with you on them.

INTRODUCTION AND SUMMARY

As the Committee is well aware, implementing the objectives of the Superfund law in the most effective and responsible manner possible has been occupying most of EPA's and our own attention over the last several years. We have used the occasion of the reauthorization process to review our practical experience and see what kinds of changes could improve the program that has been put in place without impeding the forward movement of that program.

The fundamental purpose of Superfund is, of course, to provide the right mix of public and private resources to get the job of cleaning up hazardous waste sites done quickly and effectively. Over the past four years, we have learned a great deal on how to achieve that mix, and it is clear that a strong enforcement program is critical to attaining the right balance.

Given that cleanup has to be performed, effective enforcement ensures that the costs are borne, to the extent possible, by those responsible rather than by taxpayers. By encouraging private cleanup, enforcement can increase the total resources that are available at any given time for clean-up. Private liability for cleanup should ensure lower cost -- but equally effective -- solutions, and judicial and public scrutiny in the enforcement process will impose a reasonable degree of discipline on the government in its approach to this difficult problem.

It has taken several years to sort out the liability rules and to regularize the enforcement process. And now that the rules are becoming settled and the process is more predictable, we are beginning to see the real benefits of an effective, yet fair, enforcement program. For example, most of our more than $330 million worth of private party clean-up settlements to date have come in the last 18 months, and we have obtained several settlements in the last few weeks which are representative of the trend we are likely to see in future cases. In Chem-Dyne, a case involving a site near Hamilton, Ohio, more than 150 companies have agreed to undertake a long-term remedy worth more than $18 million. By spreading the cost among the parties and using some creative "cash-out" techniques to encourage small generator participation, the responsible parties rather than the government will be implementing the remedy. Moreover, the parties will be paying shares of the cost roughly proportional to their responsibility for contamination at the site. In Westinghouse, the company has agreed to clean up six sites in Indiana where it had disposed of PCBs, and when it gets the necessary permits, Westinghouse will also build an incinerator with the capacity to destroy these PCBs and additional contaminated materials. Thus, this settlement will not only take care of the problem at six sites, but will also result in increased use of a new technology that will safely and permanently dispose of hazardous waste. This is the kind of effective and innovative response that can only come with private party participation.

Our goal in Superfund reauthorization is to build and improve on the existing scheme, taking into account our experiences over the past four years. As a result of our perspective we can not endorse any fundamental change in the liability scheme -- we have seen that it can work well. Clearly, in order to encourage private parties to coalesce and to perform a cleanup, we need effective liability rules like those which have been decided by the courts. In building on this foundation, however, we have focused on concerns raised by private parties and sought to add several positive incentives designed to bring people forward without our having to pursue enforcement to litigated judgments. We recognize that a strong liability scheme must be rationally and fairly applied, and we support amendments to Superfund aimed at increasing positive incentives, ensuring the rational application of the liability rules, and minimizing enforcement litigation as much as possible consistent with the need for effectiveness and fairness. Similarly, we support amendments aimed at making the enforcement process even more regularized, predictable, and accessible to the public and responsible parties. This should eliminate some uncertainties that were the subject of early litigation.

Using our joint EPA-DOJ settlement policy as a starting point, the Administration drafted several provisions which were intended to regularize the enforcement process and provide incentives for settlement by giving responsible parties and the public the right to participate in the Agency's decision-making process. Because the Agency will now be required to consider all of these views in advance of taking action, we also hope to improve the decision-making process. In addition, our amendment that expressly protects those who come forward to settle from the contribution claims of non-settlors will encourage settlements by ensuring a greater degree of finality than is presently available.

Fundamentally, we see the success of the enforcement program resting on a proper balance of incentives and disincentives that, on the one hand, encourage responsible parties to coalesce and come forward as a group to clean up sites, and that, on the other hand, discourage unnecessary and costly litigation. Accordingly, those that want to come forward and settle with others to undertake or fund a remedy should be given the incentives to do so. And while we certainly want to discourage parties from litigating without justification, we recognize that the success of an enforcement program also hinges on the fairness of the process and on ensuring that a party gets a full and meaningful day in court in the event settlement is not possible. It is for this reason that we have proposed amendments aimed at preserving a party's full rights to challenge the agency's response action and to secure complete relief in the event the agency was wrong.

Obviously, in drafting any amendments to Superfund, some will believe that the proposed changes go too far and others will believe that they do not go far enough. We are sensitive to those concerns and are open to ideas that will promote our goals. For this reason we have spent the past few weeks and months meeting with industry groups, environmental groups, and congressional staff members to discuss the enforcement issues, to listen to their concerns, and to describe our enforcement goals to those outside government. These discussions and exchanges have been very helpful, and we look forward to learning more about the Committee's views.

Our goal in Superfund reauthorization has been to take the tools and program already in place and ensure their more rational and cost-effective implementation. We are therefore strongly interested in the Committee's perspective on proposals which would go beyond Superfund's cleanup focus and engraft onto the statute different programs and causes of action that may result in delaying cleanups by shifting the primary focus of the statute away from cleanups. We believe, as you can well imagine, that these additional programs and causes of action will not only encourage litigation of an extensive array of complex and emotional issues, but will also interfere with the government's primary mission of cleaning up these sites in an effective and expeditious fashion.

Because an understanding of how the federal government selects and settles its hazardous waste cases is important to an understanding of the philosophy behind the Administration's enforcement proposals, I would like to describe briefly how key elements of the Superfund enforcement program work.

The Superfund Enforcement Process

Once either a potentially responsible party or EPA has performed a remedial investigation of the site and prepared a feasibility study of the various cleanup alternatives, EPA receives public comment on the study and then selects an appropriate remedy. After the remedy has been selected, EPA will seek to obtain a cleanup or the costs of cleanup through negotiations with potentially responsible parties. As I will discuss further later on, EPA shares extensive information about the site with potentially responsible parties to facilitate preparation of private settlement proposals.

If these parties are unable to reach agreement with EPA within a reasonable period of time, the Agency has several options. It may implement the remedy itself and seek to recover cleanup costs from responsible parties, it may issue an administrative order to require the responsible parties to undertake the cleanup, or it may refer the case to the Justice Department to obtain court-ordered injunctive relief. In some cases, a combination of enforcement options may be employed.

Because enforcement resources are limited, EPA does not refer all potential enforcement cases to the Department. Generally speaking, the Department will initiate action to compel responsible party cleanups only when there is a substantial health or environmental threat and we have identified an adequate number of responsible parties who are financially capable of implementing the remedy and who represent the bulk of the response demands at the site.

In selecting the defendants to be sued in a particular case, EPA and the Justice Department try above all else to bring a meritorious case against the largest number of financially sound parties who are responsible for the environmental contamination at the site. Although it is frequently difficult or impossible to gather comprehensive information on each point about each potential defendant, the following specific considerations are important:

1. The quantity of material sent to the site by the responsible party;
2. The nature of the wastes sent to the site by the responsible party, such as their toxicity, environmental persistence, migration potential, and disproportionate effect, if any, on the total cost of cleanup;
3. The strength of available evidence tracing the wastes at the site to the party;
4. The ability of the party to undertake or pay for the cleanup; and
5. The government's estimate of the number of defendants that can be included in the case fairly and efficiently.

The government seeks to initiate actions against parties that have either contributed significant quantities of waste or contributed waste that is markedly hazardous. Great care is taken to ensure that a fair and appropriate number of responsible parties are named in any action that is filed. Indeed, if the most significant contributors cannot be identified, we would not proceed on an enforcement track. We realize that we cannot be assured of obtaining complete relief, either through court order or through settlement, unless we have brought into the case the parties that are responsible for the bulk of the wastes and the most troublesome wastes at the site. Contributors of relatively small volumes will clearly be named if their wastes, for toxicity or other reasons, significantly add to the cost or complexity of the necessary remedy. Defendants are not selected on the basis of any "deep pocket" theory; financial status is relevant only because the litigation would be pointless if the parties sued could not afford to undertake or pay for the cleanup.

One example of a case in which the defendants represented a substantial portion of the waste at the site was United States v. Western Processing, which involved a waste recycling facility in a town near Seattle, Washington. In that case, we entered into a partial consent decree with 198 waste generators and transporters that provided for completion of a surface cleanup at the site. By the government's calculation, these parties had contributed over 80 percent of the wastes at the site. Negotiations are continuing with respect to subsurface remedial action.

In another case, United States v. A & F Materials Co., four of the six generator defendants sued in the action agreed to pay for past government response costs, surface cleanup, and a remedial investigation and feasibility study of any long-term problems at the site. The six parties that the government had sued were responsible for virtually all of the waste at the site. The four settling defendants were responsible for about 94 percent of the waste at the site. A fifth defendant subsequently settled as well, for a substantial sum of past response costs.

A concern has been repeatedly expressed over the past few years that the federal government may seek to hold one minor contributor responsible for the entire cost of site cleanup under the theory of joint and several liability. I would like to emphasize that this concern has absolutely no basis in fact. Not only does the government consistently seek in its cases to join the parties that are responsible, in the aggregate, for most of the problems at the relevant site, but the courts would be extremely unlikely to allow the government to obtain such a recovery. To avoid any misconceptions on this issue, let me take a few moments to explain further about the application of joint and several liability in Superfund cases.

Explicit mention of joint and several liability was deleted from CERCLA before its passage in 1980 in order to enable courts to establish the scope of liability through a case-by-case application of "traditional and evolving principles of common law" and pre-existing statutory law. In the seminal decision of United States v. Chem-Dyne Corporation, located at 572 F. Supp. 802, the court held that a uniform rule of federal common law should apply to Superfund cases, and that the rule, which because of its importance I will quote in full, should be as follows:

> [W]hen two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject only to liability only for the portion of the total harm that he himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Furthermore, where the conduct of two or more persons liable under § 9607 [section 107 of CERCLA] has combined to violate the statute, and one or more of the defendants seeks to limit his liability on the ground that the entire harm is capable of apportionment, the burden of proof is upon each defendant.

572 F. Supp. at 810. In other words, if the harm presented by the site contamination is divisible and there is a reasonable basis for apportionment of damages, joint and several liability does not apply, and each defendant is liable only for the portion of the harm for which it can show it was responsible.

For example, where a site consists of barrels of hazardous substances that are threatening to leak, and the barrels are all labeled or clearly identified as to source through records or other evidence, no one is suggesting that the owner of 10 percent of the barrels could be held liable for 100 percent of the cost of cleaning up all of the barrels. Similarly, the apocryphal "one barrel generator" could simply show that the insignificance of its contribution to the site harm constituted a reasonable basis for apportionment of the harm, thus avoiding any possibility of joint and several liability.

Frequently, however, the records of the facility or of the waste generator are very poor or nonexistent, and wastes have been mixed together in a toxic chemical "soup" or moved around in an untraceable fashion after reaching the site. In such cases, there may not be a reasonable basis for the apportionment of damages. In such circumstances, when the entirety of that toxic soup must be cleaned up, the government would be unable effectively to enforce if it were required to prove the portion of the harm caused by each responsible party. This is the basic problem that the common law theory of joint and several liability was created to address.

As I have explained, the government takes care to ensure that a fair and appropriate number of responsible parties are named in any action that the Justice Department files.

Our policies, and the great care taken by courts to apply joint and several liability only under appropriate circumstances, will ensure that the principle of joint and several liability will not be abused. Moreover, it is important to realize that most of our cases settle prior to trial, with the parties apportioning the cleanup or costs among themselves as they see fit. A review of the results of enforcement show that the resolved cases have not resulted in one party bearing a share of the cost significantly disproportionate to its contribution to the problem. One of the key reasons that parties settle is that the potential for joint and several liability encourages them to negotiate and cooperate and develop consensus settlement proposals. Without joint and several liability, the government would rarely be able to achieve settlements in the public interest in cases where large numbers of responsible parties were involved with a particular site, because each party would have the ability and the incentive to litigate its own separate share of liability against the government. Indeed, our clear goal is to reach resolutions without litigation in which defendants pay roughly in proportion to their share, to the extent such a number can ever be precisely determined.

The rules of liability I have just summarized have been established in numerous judicial decisions during the past three years. These standards comprise a potent but limited enforcement tool to discourage recalcitrance and unncessary litigation. We would prefer to proceed, however, by offering positive incentives for parties to come forward early, and we hope and expect that we will actually have to apply the liability rules in few cases. As an integral part of the enforcement process, EPA and the Justice Department have adopted an interim CERCLA settlement policy that, when implemented along with the amendments we have suggested, will ensure the fairness of the process by providing many positive inducements to settle voluntarily with the government. The policy applies both to administrative settlements by EPA and to the settlement of civil litigation by the Justice Department.

The Interim CERCLA Settlement Policy

The settlement policy broadly [illegible] what we believe are the prerequisites to obtaining negotiated private party cleanups. Three such prerequisites are: (1) an opportunity for responsible parties to participate in formulation of the proposed remedy; (2) the perception on the part of each responsible party that its share of a proposed settlement will approximately reflect its share of the responsibility for the site; and (3) some measure of finality to the settlement.

EPA has addressed the first prerequisite largely through its procedures for involving potentially responsible parties in the remedial investigation and feasibility study process. By allowing private parties to perform the RI/FS in accordance with EPA technical guidance, or at a minimum to comment extensively on the RI/FS and provide information to those conducting it, EPA has given such parties a substantial opportunity to comprehend and influence the form of the remedy selected for the site.

The settlement policy contains multiple elements to assure that parties can fairly and effectively allocate costs among themselves and avoid paying more than an appropriate share of liability. For example, EPA is making a special effort to identify as many potentially responsible parties at a site as possible. In an effort to encourage collective action, the policy authorizes the release of information to all such parties, including the identity of all notice letter recipients and the volume and nature of the wastes identified as having been sent to the site by particular parties. This information will help responsible parties group together and apportion liability among themselves according to whatever criteria they believe are appropriate, and we want to facilitate this process as much as our resources permit.

In addition, recognizing that not all parties may agree to participate in a settlement and that fewer than all may be known or solvent, the settlement policy also provides for partial settlements. A partial settlement is one for less than 100 percent of the cleanup or its costs. The policy authorizes partial settlements in several circumstances, such as when responsible parties have offered to perform or pay for one phase of a site cleanup and it is important or useful to complete that phase before proceeding with the remainder of the cleanup. A settlement for surface cleanup while subsurface contamination is being investigated is an example of a partial settlement. Partial settlements may also be allowed when they involve a substantial portion of the remedy or costs and the recalcitrance or absence of a relatively small group of parties is preventing complete settlement. In appropriate cases of this type, the government will pursue non-settling parties for the remainder of the cleanup costs.

Perhaps the most noteworthy aspect of the policy is EPA's new approach to the melding of private financing and Fund financing for remedial actions. The settlement policy acknowledges that, in certain circumstances, to encourage settlement, the government may be willing to pay a portion of the cleanup cost out of the Fund, such as where private parties have agreed to provide the lion's share of the costs and will conduct the cleanup themselves.

In addition, the settlement policy allows EPA to provide contribution protection to settling parties, to ensure that such parties are not ultimately held liable for additional costs through a later suit for reimbursement by a non-settling party who has been held liable to the government under CERCLA. As I will discuss in a moment, one of our proposed enforcement provisions would strengthen this kind of protection and thereby encourage settlement.

In a further effort to promote settlement, the policy allows responsible parties to "cash out" with the government in certain situations. For example, opportunities for cashing out may exist when the total cleanup costs are relatively small, or when the responsible party is deemed a "de minimis" contributor because the quantity of waste contributed to the site by that party is extremely small and of low hazard. We should avoid requiring such parties to litigate wherever appropriate.

Our goal in taking these steps is to increase our flexibility in evaluating private party proposals for less than 100 percent of the cleanup, where it is in the public interest to do so. By providing information, allowing for partial settlements and mixed funding, cashing out "de minimis" contributors, and providing contribution protection in appropriate circumstances, we believe that each responsible party can be assured that settlements will be fair in light of that party's share of responsibility for the site.

Finally, the settlement policy addresses the notion of finality. In addition to contribution protection, which I have already mentioned, the policy addresses covenants not to sue and releases from further liability. Expansive releases may be granted that have only limited "reopeners" for improper work or the occurrence of imminent and substantial endangerments. The scope of a release granted by the government will directly relate to the government's confidence in the ultimate effectiveness and reliability of the remedy provided by the settlement. Where treatment or destruction remedies are employed, or where a party can demonstrate continued compliance with health and environmental performance standards at a site, more expansive releases may be available. The notion of finality is conceptually a difficult one in an area like this, where even the best remedies involve some technical uncertainty. However, the government must have the ability to grant a measure of finality to parties who are forthcoming with substantial settlement proposals.

We believe that aggressive and flexible implementation of our settlement policy will go a long way toward addressing the various concerns that have been raised in connection with the Superfund enforcement program, and we hope the Congress concurs in the need for that flexibility. Our proposals for CERCLA reauthorization, however, go even further in promoting the effectiveness of the program and its fairness to responsible parties. Several of these provisions were incorporated into S. 51, the Superfund reauthorization bill reported by the

Environment and Public Works Committee. I would now like to turn to those provisions.

Proposals to Improve the Superfund Enforcement Program

By providing substantial benefits to those who settle and by codifying some of the procedures we have devised to conduct the program fairly and efficiently, the Administration's enforcement provisions are intended to encourage voluntary settlements and to reduce the need for the government to resort to litigation to achieve private party cleanups under CERCLA. For this reason, we believe our amendments would significantly benefit the federal justice system. Not only would fewer cases have to be filed to achieve a given number of private party cleanups, but the courts would not be burdened with as many cases involving large numbers of parties and technically complex remedies. I would like to emphasize that we are extremely willing to work with this Committee in fashioning additional amendments to promote the efficiency and fairness of the enforcement process.

SECTION 126

The fairness of a joint and several liability scheme depends upon the clear availability of contribution. Moreover, responsible parties need both the right of contribution and contribution protection to bring all other responsible parties to the settlement table.

Section 126 of S. 51, the contribution provision, was intended to clarify and confirm that a right of contribution exists under CERCLA and to establish a procedure for handling contribution claims in a rational and efficient manner that will promote settlements and prevent unnecessary litigation. This Committee has expressed a concern that, as drafted, section 126 would affect the procedural rights that responsible parties have under the Federal Rules of Civil Procedure. This was not the Administration's intent. It is our understanding that the Committee now has the draft revision of the contribution provision that is attached to this statement, which EPA and the Department have approved and have sent through proper channels for clearance. The draft revision both accomplishes the government's original purposes and addresses the Committee's procedural concerns. For the sake of simplicity, I will focus on the provision as redrafted.

Section 126 confirms the recognition of several courts that a right of contribution against other potentially liable parties is available under CERCLA. See, e.g., United States v. Ward, 8 Chem. & Rad. Waste Litig. Rep. 484, 487 (D.N.C. May 14, 1984); United States v. SCRDI, 20 Env't Rep. Cas. (BNA) 1753, 1759 & n.8 (D.S.C. Feb. 23, 1984). Section 126 also provides that parties who enter into a judicially approved good faith settlement with the government are protected from the contribution claims of other liable parties. Along with the settlement policy, this section gives finality to settlements with the government, by protecting parties from any additional liability for the cleanup in issue.

Section 126, as revised, also establishes an orderly procedure for resolving contribution claims in the context of enforcement litigation. It provides that the hearing of issues relating to contribution and indemnification would be stayed until after resolution of the government's case through judgment or settlement, but allows defendants to file claims for contribution against other defendants and third parties as soon as the enforcement action has been brought. In this way, all relevant parties will be informed that they at some point will have to resolve their potential liability under Superfund, and all parties will be encouraged to come forward and join in settlement discussions. The parties that are brought into the government action will also be able to challenge whether there has been a release at the site and whether the selected remedy is appropriate; the only issue postponed for judicial consideration by section 126 would be the allocation of damages among the defendants and third parties.

The procedure provided by section 126 promotes the public's interest in obtaining prompt cleanup from the parties who are responsible for the bulk of the waste and the most troublesome wastes at the site, while preserving the ability of such parties under the Federal Rules of Civil Procedure to bring other potentially responsible parties into the enforcement action.

Even though under existing law a joint tortfeasor cannot compel joinder of other alleged responsible parties under F.R.C.P. 19, we support the ability of principal defendants formally to join third party defendants in the case in chief under F.R.C.P. 14(a). However, there are several reasons for postponing the hearing of the defendants' contribution and indemnification claims until after the government's claims are resolved, as section 126 would provide.

First, unless a court determines, in the first instance, that the named defendants are jointly and severally liable for the cleanup, there is no basis for a third party contribution claim. If the court concludes that the harm is divisible, neither joint and several liability nor contribution comes into play, and the government will have to decide whether it wishes to seek relief from all of the known responsible parties. If the court concludes, however, that the defendants are jointly and severally liable, the court will need to resolve the scope of the remedy and the inevitable challenges to the remedy before it can apportion the remedial costs. Our experience has shown that until the remedy and costs are fixed, neither the court nor the parties can divide up the costs in a satisfactory manner. Moreover, fixing costs is necessary to achieve settlement, because parties are understandably hesitant to sign a blank check.

Once the issue of remedy is resolved, however, the public interest requires that the cleanup get underway promptly. Discovery of evidence, trial preparation, and trial in a case involving apportionment among several hundred parties could be an extremely lengthy process. Thus, resolution of apportionment issues could well take several years if the matter goes to trial. Additional peripheral issues related to indemnification would also be time-consuming to resolve. For this reason, section 126 ensures that the cleanup operation will commence while the action among the defendants proceeds. Under this approach, the public interest is served by allowing the cleanup to go forward. The defendants' interests are protected by enabling them to obtain immediate reimbursement from the other responsible parties in the same action, before the same judge. Fortunately, we have been successful in avoiding trials in most of our cases, and the parties have apportioned the costs of settlements among themselves. This is precisely what we wish to encourage. Thus, as modified, section 126 does not adversely affect the procedural rights of litigants. Rather, it simply establishes a mechanism for the speedy and efficient resolution of the government's and the defendants' claims in government enforcement actions that are filed to protect public health, welfare, and the environment.

SECTION 133

Other provisions of the Administration's proposal that were incorporated into S. 51 will similarly reduce litigation costs and encourage settlement. For example, like section 126, section 133, the pre-enforcement review section, is intended to clarify and improve upon rules which are already reflected in the case law and to grant certain additional procedures for assuring the efficacy and fairness of Superfund enforcement.

Section 133 embodies several goals. It contemplates more regular and formal participation by responsible parties and the public in the remedy selection process, to be reflected in an administrative record, which will enhance consistency in approach and the quality of the remedy and will facilitate judicial review when it occurs. It also enables potentially responsible parties to have a full and fair day in court -- in addition to their opportunities to participate in the remedy selection process -- before their monetary liability becomes fixed. Finally, it confirms the uniform judicial holdings that have strongly disfavored court challenges which stay or otherwise delay implementation of the cleanup remedy.

Specifically, section 133 is made up of three separate but interlocking elements. First, section 133 provides that judicial review of EPA response actions or administrative orders is not available until EPA seeks to recover its response costs or to enforce an order to undertake a response action. Second, section 133 provides that judicial review of Agency decisions to take response actions will be on the basis of the administrative record. EPA's remedial decisions may be overturned if they are arbitrary, capricious, or otherwise not in accordance with law. Finally, section 133 establishes a new claims procedure for parties that have incurred response costs pursuant to an administrative order issued under CERCLA section 106, when these parties wish to challenge their liability, the propriety of the response action, or both. Under this provision, parties will be fully compensated, with interest, for any costs incurred by them that a court finds were not proper or for which they were not liable.

I would like to emphasize that the portion of section 133 that limits pre-enforcement review simply codifies what the courts have uniformly held is the law under Superfund. See, e.g., Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487 (D.N.J. 1985)(and cases cited therein). There are several reasons for this rule. The goal of a pre-enforcement challenge is ordinarily to prevent implementation of the remedy that EPA has selected. Accordingly, to be effective, such challenges generally request an injunction halting further remedial action pending litigation of the appropriateness of the remedy. Pre-enforcement review therefore would delay response action and exacerbate already serious health and environmental threats. Indeed, as we have seen in litigation under the National Environmental Policy Act of 1970, challenges to agency decisions on environmental issues can take years to resolve.

Although concerns have been raised that postponing judicial review might interfere with the due process rights of potentially responsible parties, this is not the case. The basic requirement of due process is that the government must provide a party with a meaningful hearing at a meaningful time. Parratt v. Taylor, 451 U.S. 52, 540 (1981). Such a hearing, however, need not occur at the earliest possible time. It is clear under the factors enunciated by the United States Supreme Court that section 133 fully comports with due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (court must balance private property interest, risk of erroneous deprivation, and government interest to determine whether procedures satisfy due process). The governmental and public interest in prompt response action clearly outweighs a responsible party's interest in the timing of review and potentially protracted litigation prior to implementation of the remedy, especially when the government's interest is coupled with the available defenses to litigation and the procedures both for participating in the remedy selection process and for obtaining reimbursement from the government in the event that the party is not liable or the remedy is inconsistent with the National Contingency Plan.

We recognize the desire of potentially responsible parties to be able to test and to discipline the remedy selection process to ensure that selected remedies are adequate but not excessive. This is an important goal, which should be met through the use of a regularized administrative process before the remedy is chosen in addition to judicial review before monetary liability becomes ultimately fixed. To enable EPA to promulgate regulations that ensure a regularized process for the participation of potentially responsible parties and the public in development of the administrative record underlying the selection of remedy, the Department would support adding some additional language to section 133(b) of S. 51, along the following lines:

> The President may promulgate regulations establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which judicial review of response actions will be based.

The procedures contemplated and provided by section 133 are intended to be consistent with the requirements of the Administrative Procedure Act. Section 133 contemplates that EPA's remedial decisions will be made on the basis of an informal administrative record, and it incorporates the APA standard of review for such decisions. Although the APA's scope of review is deferential, it is based at least in part on the recognition that the challenging party has already had an opportunity to participate in the development of the record that is being reviewed. Certainly, if responsible parties have a different, cheaper, and better way to remedy the problems at a site, EPA should hear about it before the Agency embarks upon the remedy -- not afterward.

Moreover, the arbitrary and capricious standard applies only to review of the response decision. The issue of liability will be determined de novo -- that is, all parties will be able to introduce outside evidence on liability, and the court will decide the issue on the basis of a preponderance of the evidence.

There is no reason, however, for courts to review the remedial decision under more than an arbitrary and capricious standard. Congress and the courts have consistently determined that, after the kinds of opportunities for participation and comment that responsible parties and the public have in Superfund cases, judicial deference to the technical decisions rendered by the agency is appropriate. This is true even when the administrative decision will have a substantial economic impact on an affected person. Courts are not particularly well-suited for completely reweighing technical decisions on remedy, and for the court to do so would also waste judicial resources. Under our proposal, the court will have before it the competing views of the parties on the record, and the court will be able to resolve the controversy by ensuring that all parties' views were considered and rationally addressed in the record. Moreover, the standard will be applied in the context of the requirements of the National Contingency Plan. Thus, responsible parties will still be able to establish that the Plan was not followed or that specific costs were not proper.

Citizen Litigation (Section 138)

Both section 126 and section 133 attempt to strike a proper balance between the roles of the government, responsible parties, the public, and the courts. Our position on citizen suits under Superfund is consistent with our attempts to foster this proper balance.

Section 138 of S. 51, the citizen suit provision, would authorize a lawsuit by any person against persons alleged to be in violation of standards, regulations, requirements, or orders that have become effective under CERCLA. The section would also authorize lawsuits against the President -- meaning, for most Superfund activities, against EPA -- for failure to perform nondiscretionary acts or duties. Suits could not be commenced on the basis of statutory or regulatory violations if the President or a state were diligently prosecuting an enforcement action against the alleged violator.

In a highly emotional area such as this, it is to be presumed that citizens will avail themselves of any access to federal court granted by Congress. Such litigation will be costly and will certainly impose burdens on the courts and the government. We therefore urge that the Committee carefully examine section 138 and any other citizen suit provisions that may be proposed to determine whether there exists a need or a problem which can be addressed only by creating new rights of action. The actual impacts of such provisions will depend on their specific elements. The Department has consistently opposed adding citizen suit provisions generally and opposes section 138 in particular. We have already expressed several of our concerns to this Committee and I would like briefly to reiterate some of these important points.

In general, citizen suits can disrupt federal resource allocation and federal enforcement priorities, because the government must monitor or even intervene in such suits to reduce the risk of unfavorable precedents regarding the application of statutory or regulatory requirements. Such suits may also greatly increase the docket burdens of particular federal district courts, thus delaying the hearing of all actions. Any ability of citizens to bring nonfederal claims through the pendent jurisdiction of federal courts would further aggravate this docket crowding.

Section 138 raises additional problems. One problem is that it would reverse the burden of proof otherwise existing under Federal Rule of Civil Procedure 24 for intervention as of right, forcing the government to show that it is adequately representing the potential intervenor's interests before intervention could be refused. This greatly heightens the opportunity for intervenors to interfere with the government's control over its enforcement litigation. Not only may such intervention lead to delays from additional discovery and examination of witnesses, but intervenors who are local citizens are likely to have goals different from the government's. This divergence in goals may cause severe problems. For example, while the government wants to achieve prompt and cost-effective cleanup, intervenors may want a particular remedy such as excavation and removal, and may refuse to accept any settlement that does not incorporate their objectives. Intervenors may also bring up distracting and disruptive claims for personal injuries or economic loss, the ramifications of which I will discuss more in a moment. We believe that citizens may adequately provide their views to the court through participation as *amicus curiae*, which would not have the disruptive effects I have just outlined. Moreover, permissive intervention, which the court may grant in its discretion under appropriate circumstances, is still available.

Many other problems with section 138 would arise through the interaction of the section with other provisions. It is clear that the impact of this section will expand dramatically every time additional requirements are added in the reauthorization process or elsewhere. In that sense, this is an open-ended provision. For example, citizen suits to enforce mandatory deadlines, such as the deadlines for federal facility cleanups in section 137 of S. 51, would significantly burden the federal government and the federal courts with wasteful litigation. To the extent that the pace of federal cleanup activity is determined by the time needed for planning and the availability of resources, such lawsuits would achieve nothing but higher litigation costs for all parties.

We note that section 137 also has other problems. For example, it requires agencies to submit annual budget requests for funding adequate to complete remedial action, and it purports to restrict the power of the President to redelegate certain Executive Branch authorities to agencies other than EPA. We believe these provisions impermissibly interfere with Presidential authority. Moreover, if citizens could sue to enforce these mandatory requirements, the courts might also take action impermissibly interfering with the President's authority.

Any provision for mandatory cleanup standards would similarly lead to numerous inappropriate and burdensome citizen suits. We wholly agree that citizens living in the vicinity of a site should have some opportunity to participate in the response process to assure themselves that their interests in an appropriate remedy are being adequately protected, and we have provided for this. The most appropriate place for this participation is in development of the administrative record leading to selection of the remedy. Citizens and litigation-oriented citizen groups should not be able to use the federal court system to challenge the propriety of a remedy or to compel adoption of the remedy of their choice once EPA has used available information, public input, and its own expertise to select a remedy. Not only would such lawsuits further clog the federal courts, but they would put the courts in the position of second-guessing the complex balancing of technical, scientific, and economic factors performed by EPA in the first instance. Therefore, the oversight role of the public under CERCLA should largely be limited to providing input on the remedial alternatives before the remedy is selected and to reviewing and commenting on any proposed consent decrees that are filed. I would like to note that, to the extent citizens want the ability to sue to reduce imminent public health hazards where the government has not yet acted, this ability is currently available under 1984 RCRA amendments.

As I mentioned, citizen suits could lead to the litigation in federal court of a broad array of nonfederal and non-Superfund issues, such as claims under state law for personal injuries and property damage. Our concerns with such a result would be greatly magnified in the context of a provision that gave citizens an independent right to pursue such claims in federal court.

The Department has consistently and strongly opposed putting any federal cause of action provision in Superfund, for several reasons. First and most importantly, Superfund is a statute for obtaining cleanups of the nation's hazardous waste sites. It must not be diluted and encumbered by complex questions of individual harm. Moreover, issues of remedy must not become linked with individual damage claims, which could slow the very cleanup process designed to prevent actual health problems from occurring. A federal cause of action for personal injuries allegedly caused by hazardous waste would also:

- Shift the focus of toxic tort litigation from state courts to federal courts, burdening the federal system with untold numbers of cases involving neither a federal question nor diversity of citizenship;
- Retard the careful and incremental evolution of state tort law in this area;
- Subject the United States to liability for personal injuries outside the framework of the Federal Tort Claims Act, stripping the federal goverment of its protections under that Act and opening the door to a flood of litigation concerning federal facilities;
- Be fundamentally inequitable in its operation, because it would provide benefits to a class of people suffering damages ostensibly related to a particular source and would not provide benefits to other people suffering identical damages resulting from other sources that are equally hard to trace (such as air pollution or chemical products or additives); and
- Erode further the willingness of private insurers to underwrite the risks of operating any facilities that handle hazardous substances, thus making fulfillment of financial responsibility requirements under the Resource Conservation and Recovery Act (RCRA) and CERCLA yet more difficult.

We therefore urge the members of this Committee to oppose strenuously the insertion of a federal cause of action into S. 51.

Finally, I would like to comment on the issue of federal facility cleanups and some of the ways that have been proposed to affect the pace and manner of such cleanups.

We all recognize that federal agencies must aggressively pursue the cleanup of federal facilities. However, any provision designed to affect federal facility cleanups must be based on a careful evaluation of the agencies' statutory missions and a full realization of the basic differences between federal agencies and private businesses. As this Committee is fully aware, federal agency programs must go through a series of detailed authorization, funding, and procurement processes intended to assure the proper expenditure of federal funds, and such processes take time. Mandatory schedules that seek to compress the time needed for planning and funding CERCLA cleanup actions will skew agency priorities that are designed, in light of all applicable environmental laws, to address the greatest health and environmental hazards first.

Moreover, citizen suits to enforce mandatory schedules may lead to ad hoc judicial decisions which will further disrupt the priorities and planning of agency environmental compliance programs. Cleanups cannot be carried out in a rational and comprehensive manner if the courts are able to inject themselves into agency decisions concerning the cleanup of individual federal facilities. Instead of mandatory schedules enforceable through citizen suits, S. 51 should simply require that all studies and response actions be accomplished as rapidly as practicable.

For similar policy reasons, the Justice Department has consistently opposed any attempt to grant EPA the authority to sue other federal agencies for federal facility cleanups, and we appreciate greatly the absence of such a provision from S. 51. Disputes among Executive Branch agencies concerning federal facilities and programs are properly resolved by the President as Chief Executive -- not by the courts. I would also like to note that such a provision would raise substantial constitutional concerns.

In sum, we believe that our enforcement proposals will inspire considerably more private party activity than we have seen in the past, by enhancing the balance of incentives and disincentives needed to achieve prompt settlements in the public interest, and by making more streamlined, predictable, and fair the process already in place under the 1980 statute. In addition, our proposals will maintain a rational and sound allocation of responsibility among the government, responsible parties, citizens, and the courts. Nonetheless, as we carry out the Superfund enforcement program, we intend to keep very open minds about new methods of increasing private party participation in Superfund, and we look forward to working with the Committee and with the rest of Congress in reauthorizing this extremely important statute.

ATTACHMENT

DRAFT REVISION TO CONTRIBUTION LANGUAGE

Any defendant in a government enforcement action under CERCLA should be able to file a claim for contribution against other defendants and third-party defendants as soon as the enforcement action has been brought. Such filings will inform all relevant parties that, at some point, they will be forced to litigate or settle their liability under Superfund. These private party actions should encourage additional parties to come forward and join in settlement discussions with the government. It is important, however, not to delay resolution of the government's enforcement case by diverting the court's attention to issues in controversy among the defendants and third-party defendants.

To achieve these goals, the following amendment of S. 51 is suggested:

Sec. ___. Section 126 of S. 51, the Superfund Improvement Act of 1985, is amended --

(a) On page 90, by striking paragraphs (1) and (2) and inserting in lieu thereof the following:

> "(1)(1) During or following any civil action under subsection 106 or under subsection (a) of this section, any defendant may seek contribution from any other person liable or potentially liable under subsection (a). Such claims shall be brought in accordance with section 113 and shall be governed by Federal law. Except as provided in paragraph (4) of this subsection, nothing in this subsection shall impair any right of indemnity under existing law.
>
> "(2) In any civil action brought by the United States or a State under this section or by the United States under section 106, all proceedings on claims in the nature of contribution or indemnification shall be stayed pending entry of judgment or settlement on the claims of the United States or the State under this section or section 106.";

(b) On page 91, by inserting "and shall be governed by Federal law" before the period and after "section 113" on line 22.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 12 1985

Honorable Strom Thurmond
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department recently sent you a letter outlining its concerns with S. 51, the Superfund Improvement Act of 1985. That letter included the Department's objections to section 129 of the bill, which would establish a victim assistance demonstration program, and to section 138, the citizen suits provision. Although funding for section 129 was deleted by the Senate Finance Committee on May 16, because the merits of the provision may be considered by the full Senate, I wanted to set out in greater detail our concerns with the victim assistance provision on legal issues, as well as to reiterate our concerns with the citizen suits provision. In this regard, Administrator Lee Thomas and Secretary Margaret Heckler addressed in detail the serious policy and technical problems with section 129, the victim assistance provision, in a letter to Senator Packwood, which is attached for your review.

The Justice Department is concerned that section 129 will generate significant litigation, in large part as a result of its many ambiguities. Not only will this interfere adversely with the implementation of the Superfund program, but such litigation may significantly burden the federal courts with highly complex issues. Moreover, because its terms are so general, the section effectively delegates to the federal courts the responsibility of managing the program through litigation. For these reasons, we urge the members of the Committee to consider carefully the implications of this section, and to oppose section 129 when S. 51 is considered in the Senate.

Section 129 establishes a three-step process for demonstration project grants. First, the basis for selecting award sites will be health studies and assessments performed by the Agency for Toxic Substances and Disease Registry (ATSDR). Second, where an ATSDR study indicates that the population of a specified geographic area has been placed at "significantly increased risk" of contracting a disease or injury shown to be associated with exposure to a hazardous substance, the appropriate state officials may nominate such area for a grant. Finally, the President or his designee will select, from among the sites nominated, between five and ten areas, in each of fiscal years 1986 and 1987, for demonstration assistance grants.

Because the legislation is essentially silent on the judicial reviewability of these requirements, except for committing the final selection of sites to the discretion of the President, we must assume that all other provisions of the bill will be subject to judicial review. This conclusion is reinforced by section 138 of the bill, which creates a private cause of action for citizens to sue any agency "alleged to be in violation of any standard, regulation, condition, requirement or order." This vague language may well be construed to apply to most of the requirements of section 129. Consequently, we are seriously concerned that many aspects of section 129 will only be resolved after lengthy and complex litigation.

Judicial Challenges to ATSDR Health Studies

Both the terms of the health studies and the way they are carried out will be subject to legal challenges. Because an area may only be selected if the ATSDR has conducted a health study or assessment, it is likely that, as an initial matter, pressure through the courts will be brought on the ATSDR to conduct additional studies. Residents of areas not selected for studies, or residents immediately outside an area selected for study, could sue for inclusion in the study area. Lawsuits to compel the ATSDR to study specific areas will inevitably interfere with the agency's primary mission.

Furthermore, the nature and terms of the health studies performed by the ATSDR may also be subject to substantial judicial challenge because of the ambiguity of the legislative mandate. For example, it is not clear what kind of study would demonstrate an "association" between exposure and an increased risk of disease or injury -- animal studies, mere statistical correlation, or perhaps something more. It is not clear what level of exposure must be considered; is any exposure sufficient, or is there some exposure threshold below which an association will not be found? Nor is it clear what constitutes a significantly increased risk. Moreover, it is even unclear what agency will be responsible for resolving these issues -- EPA, ATSDR, or the nominating state agency. As the attached letter sent by Administrator Thomas and Secretary Heckler notes, studies conducted on the basis of these very general guidelines cannot with any credibility identify specific individuals injured exclusively by exposure to a hazardous substance.

Judicial Challenges to Site Nominations

With respect to the second step in the process, nothing in section 129 suggests that the state's decision to nominate, or not to nominate, a site would not be subject to judicial review. While residents of certain neighborhoods might want their geographic areas designated, others might oppose such a designation, fearing that it would reduce property values. In either case, it is likely that the decisions of responsible state officials will be challenged in the courts.

Judicial Challenges to the Size of Grants

The President's selection of between five and ten sites in each of fiscal years 1986 and 1987 is committed to his discretion. However, the size of the grant which he provides for each demonstration project is dealt with in a separate subparagraph of section 129, and, accordingly, may not be committed to his discretion. Consequently, it is not entirely certain that lawsuits may not be brought against the President or his designee by successful grant applicants who believe that more money should have been provided for their sites.

Judicial Challenges to the Structure of Benefits

Once a grant for a demonstration project has been made, additional judicial challenges to the implementation of the program are likely. The problem arises partly from the fact that section 129 promises far more in health benefits than it proposes to fund. It suggests that lifetime health monitoring and health care insurance coverage will be provided for all residents of the selected geographic areas. If the states administering the programs are unable to obtain such policies or provide directly analogous service, as seems distinctly possible, disaffected beneficiaries are likely to bring suit to compel the states to live up to the requirements of the statute and the grant.

It is unclear whether section 129 will create a legal entitlement to all of the medical benefits enumerated in subparagraphs (5)(A), (B) and (C). However, the implementation of the grant, and the tradeoffs as to what mix of benefits to provide, will be highly controversial and, accordingly, will ultimately be resolved by the courts. For instance, it is unclear what constitutes "appropriate medical screening, examination and testing" as required by the amendment. Nor is it clear how the population of the geographic area will be defined, *ie.*, whether new residents, transients, and people who work, but do not reside, in an area would be covered by the benefits. It also is unclear whether, or to what extent, individuals living in the area who are suffering from illnesses which were not caused by exposure (*ie.*, cancer diagnosed prior to exposure) or whose risk from proven causes other than exposure (*ie.*, smoking) would be covered.

For all of these reasons, the Department is concerned that section 129 will result in costly and burdensome litigation which may seriously impede the implementation of the Superfund cleanup program, and further tie up the already inundated federal courts. Consequently, we urge the members of the Committee to vote to delete this provision when S. 51 reaches the floor of the Senate.

Citizen Suits

Section 138 of S. 51, the citizen suits provision, would authorize a lawsuit by any person against persons alleged to be in violation of standards, regulations, requirements, or orders that have become effective under CERCLA. The section would also authorize lawsuits against the President -- meaning, for most Superfund activities, against EPA -- for failure to perform nondiscretionary acts or duties. Suits could not be commenced on the basis of statutory or regulatory violations if the President or a state were diligently prosecuting an enforcement action against the alleged violator.

Any such provision will generate unnecessary litigation and will probably interfere with the government's enforcement efforts. The Department has previously expressed its concerns to the Committee about citizen suits provisions generally, and section 138 in particular. I would like to briefly reiterate our concerns.

In general, citizen suits can disrupt federal resource allocation and federal enforcement priorities, because the government must monitor, or even intervene in, such suits to reduce the risk of unfavorable precedents regarding the application of statutory or regulatory requirements. Such suits may also greatly increase the docket burdens of particular federal district courts, thus delaying the hearing of all actions. Any ability of citizens to bring nonfederal claims through the pendent jurisdiction of federal courts would further aggravate this docket crowding.

Section 138 raises additional problems. Many of the problems would arise through the interaction of section 138 with other provisions. To that extent, the impact of this section will expand dramatically every time additional requirements are added in the reauthorization process or elsewhere. In that sense, this is an open-ended provision. For example, citizen suits to enforce mandatory deadlines, such as the deadlines for federal facility cleanups in section 137 of S. 51, would significantly burden the federal government and the federal courts with wasteful litigation. To the extent that the pace of federal cleanup activity is determined by the time needed for planning and the availability of resources, such lawsuits would achieve nothing but higher litigation costs for all parties.

Any provision for mandatory cleanup standards would also lead to numerous inappropriate and burdensome citizen suits. We wholly agree that citizens living in the vicinity of a site should have some opportunity to participate in the response process to assure themselves that their interests in an appropriate remedy are being adequately protected and we have provided therefor. The most appropriate place for this participation, however, is in the development of the administrative record leading to selection of the remedy. Citizens and litigation-oriented citizen groups should not be able to use the federal court system to challenge the propriety of a remedy or to compel adoption of the remedy of their choice once EPA has used available information, public input, and its own expertise to select a remedy. Not only would such lawsuits further clog the federal courts, but they would put the courts in the position of second-guessing the complex balancing of technical, scientific, and economic factors performed by EPA in the first instance. Therefore, the oversight role of the public under CERCLA should largely be limited to providing input on the remedial alternatives before the remedy is selected, and to reviewing and commenting on any proposed consent decrees that are filed. It is important to note that, to the extent citizens want the ability to sue to reduce imminent public health hazards where the government has not yet acted, this ability is currently available under 1984 Resource Conservation Recovery Act amendments.

For all of these reasons, we strongly object to the inclusion of section 138 and we urge the members of the Committee to vote to delete this provision.

The Office of Management and Budget informs us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Attachment

The CHAIRMAN. Thank you very much. I have a few questions here, then I will turn to my colleagues.

Mr. Thomas, EPA's settlement policy acknowledges that liability releases are appropriate in certain circumstances. That policy, however, requires that any liability release must include a reopener clause which will preserve the right of the Government to seek additional cleanup action or recover additional costs in certain circumstances.

How fair is it to require such a reopener, particularly at a second waste site, when EPA itself has selected the site and the means of disposal as the appropriate remedy?

Mr. THOMAS. Senator, that goes right to the heart of one of the real dilemmas involved in cleaning up these sites, and that is the confidence we have in the remedy for the disposal of the waste.

The policy that we have established by settlement is that, basically, the better the remedy, the better the release. By that, the more confidence we have in the remedy, the more confidence we will give as far as the release is concerned to our picking up—meaning the Government—part of the liability or future liability by not requiring a reopener clause.

But the bottom line on it is that is one of those areas where we have gone forward and suggested that the Government pick up some of the additional future liability or uncertainty associated with some of the remedies. But I think we need clearer direction from Congress as to whether you feel we are moving in the right direction there or not.

The CHAIRMAN. Similarly, how fair is it to hold a party liable indefinitely for environmental technologies that have not yet been developed?

Mr. THOMAS. Well, Senator, the liability for the waste itself, I think, originally rested with the generator of the waste, and I think that the fairness of holding them liable originally, holding them liable today, and holding them liable in the future is basically the same.

It is their waste; they generated it. And the basic issue is whether we feel they are going to be responsible for it or whether we, the Government, are going to pick up part of the responsibility.

What we have tried to incorporate is if we feel it is their responsibility and their liability, in some cases we feel we can begin to pick up some of the future liability associated with it, particularly in those cases where they incorporate the latest technology available, the best technology available, for disposal.

The CHAIRMAN. What incentive does industry have to agree to a settlement which requires the hazardous substances to be moved to a secondary site if industry continues to be liable to the Government?

Mr. THOMAS. Senator, I think they can have the confidence that there is much more certainty associated with their future liability in that controlled situation than in the uncontrolled situation that we found it.

Clearly, the Government's use of its enforcement authorities in the future would take into account the actions of that industry in cleaning up a site in the past. I do not think there is any question about that. It gets directly to the point that Mr. Habicht made about how we use the authorities we are given.

I think that is exactly what we would take into account, and I feel they should have great confidence in going forward, completing the cleanup of that uncontrolled site, even if it incorporates the moving to a control and disposal situation of some of that waste.

The CHAIRMAN. Mr. Thomas, in your written statement the critics of joint and several liability contend that Government could sue the generator of a single drum of waste found at a massive site for the entire cleanup.

While this has not yet occurred in practice, do you dispute that CERCLA allows for such enforcement?

Mr. THOMAS. Senator I think in theory, that would be allowed. But, clearly, in practice it is not done. I do not think that it would be done. I do not think even if we tried to do it, the courts would allow us to do it.

I think that to try to moderate or modify that authority because of that theoretical circumstance would undermine the major provision of our enforcement program.

The CHAIRMAN. Now, is it correct, then, that it is only the Government's prosecutorial discretion that restrains it from suing the one-drum generator?

Mr. THOMAS. Let me ask Mr. Habicht to respond to that, Senator.

Mr. HABICHT. Mr. Chairman, if I might respond to that, I think it is fair to say it is a bit more than just prosecutorial discretion. We are concerned that if we apply joint and several liability in that kind of extreme situation, a court may well find that it is not applicable in that sort of situation.

There may be a number of reasons for such a result. Congress indicated in the legislative history in 1980 that joint and several liability was deleted expressly from the statute because it should be left to the courts to deal with on a case-by-case basis so that it would not be oppressively or unfairly applied in inappropriate circumstances.

So I think it is more than just prosecutorial discretion, though I think that prosecutorial discretion is an important component. I would hope and expect that all prosecutors would take guidance from Congress that joint and several liability should not be abused.

The CHAIRMAN. It is my understanding that in a typical Superfund case, different generators contributed waste to a given site at different times over a period of years and that they did not act jointly at all.

On what basis can a court impose joint liability when they have all acted individually?

Mr. HABICHT. Mr. Chairman, the development of the law of joint and several liability and joint tort liability, in its early stages, certainly looked toward concerted action, joint action, as your question indicates.

The law has developed, though, particularly in situations like those found in Superfund cases. Where parties act independently but contribute to a common, indivisible harm, the injured party in many contexts does have available to him the joint and several liability tool, when his harm is indivisible and it is incapable of being reasonably apportioned among multiple parties, whether or not they acted jointly.

The CHAIRMAN. Mr. Habicht, can you explain why IBM was named as a defendant in the *Chemical Conservation* case when it contributed less than 1 percent of the waste?

Mr. HABICHT. Mr. Chairman, I would be happy to provide a detailed answer to that. Briefly, to put that case in the context of the general enforcement process, the four defendants in the *Conservation Chemical* case, as I recall, were responsible for well over 80 percent of the waste by volume, moreover, as any industry representative will tell you, volume is not a perfect determinant of actual contribution to the problem.

As I recall, some of the generators with relatively small percentages by volume in that case, as in other cases, contributed wastes that were either particularly difficult to clean up or had toxic properties that made them more serious beyond their volume, and those are the kinds of considerations that we take into account.

You cannot just look at volume because some wastes are much more toxic and much more difficult to cleanup than others.

The CHAIRMAN. In other words, you consider toxicity as well as volume in the matter?

Mr. HABICHT. That is correct.

The CHAIRMAN. Mr. Habicht, what justification is there for retroactively imposing liability on a generator who was not quilty of negligence or any misconduct and violated no existing law at the time the waste was disposed?

Mr. HABICHT. Mr. Chairman, the way that we have viewed that question, it has a constitutional and a policy component. From the standpoint of constitutional law, it appears to us to be constitutional.

One way of looking at it is that whereas the acts occurred in the past, what is being addressed in the lawsuit is a harm that is ongoing; it is a current harm, a situation that is worsening at the present time. So in that sense, it is not retroactive; it is dealing with a current problem, whose causes or roots go back into the past.

And, again, this is not a punitive statute. These people are not considered criminals or wrongdoers in a traditional sense, but Congress, for example, in some statutes in the past, has looked at difficult problems, the full extent of which was known only late in the game, and allocated the costs of dealing with that problem to people who arguably did not know it was a problem at the time. I am thinking of the black lung situation and a number of others.

So it is not meant to be punitive; it is meant to assess the costs as accurately as possible for an existing problem to the people who are the actual cause.

The CHAIRMAN. Now, either one of you can answer this question—probably Mr. Thomas. Is it not true that under the current liability scheme and present enforcement policies that a company defendant acting responsibly or an innocent outside contractor under EPA direction could be held strictly, jointly, and severally liable for undertaking a site cleanup in complete compliance with the best known environmental standards?

And if this is so, will this not serve to chill responsible parties and reliable contractors from entering the cleanup market, thereby slowing site cleanups, and thus thwarting the original goal of Superfund?

Mr. THOMAS. Senator, that is true and it is an area where we feel that corrective action is required as far as statutory revision is concerned. We have attempted, through our contracting mechanism over the last several years with our contractors, to deal with their liability when they are cleaning up sites.

We feel that in the statute, however, this liability needs to be dealt with by Congress because we do feel that it is an issue and it will impede the overall cleanup progress and cleanup goal of the program if it is not dealt with.

The CHAIRMAN. In your opinion, have the courts shown a reluctance or an inability to handle joinder or third-party defendants under the guidelines set out in the Federal Rules of Civil Procedure, and what evidence do you have to support your conclusion?

Mr. HABICHT. Again, Mr. Chairman, we would be happy to provide a more detailed answer to that in writing right away. Our experience with the courts thus far has been that there is a good bit of confusion on how best to deal with third-party claims.

In different situations, you have a very wide range of third parties, some of which are operators and generators and transporters, some of which are very small contributors—contributors of all stripes and shapes.

And there has been a lot of wrangling around and confusion, and so forth, on how to deal with those claims. One of the reasons for the provisions that we have written into our proposal is to provide for a process that minimizes the problems of having numerous third-party claims presented and dealt with.

By and large, courts have been reluctant to add extremely large numbers of third parties because of the expense and burden of having all those parties in the case in chief, and have left the equitable apportionment until later. But it is very important to have those rules clarified.

The CHAIRMAN. Are there constitutional difficulties with the application of the strict, joint, and several liability scheme of Superfund, considering the selected application of the standard on the potential defendants at a site?

Mr. HABICHT. Mr. Chairman, we do not see a constitutional problem because, in our view, it would have to be as applied. I cannot say that there might not be some serious issues raised in a given application in a given case, though I believe that the law and the ability of courts to develop joint and several liability rules which are logical and rational would prevent its application in a situation that could truly be oppressive, particularly to the point of being unconstitutional.

Prosecutorial discretion is inherent in many laws, and therefore it certainly has not raised any of those kinds of concerns as it has been applied so far.

The CHAIRMAN. Does EPA have authority, Mr. Thomas, to undertake cleanup while negotiations and litigation are underway?

Mr. THOMAS. Yes, sir, we do, using the fund itself.

The **Chairman**. Mr. Habicht, section 126 would codify the right of contribution. Does such a right currently exist under the Superfund statute?

Mr. **Habicht**. One of the reasons, Mr. Chairman, that we proposed an express right of contribution is because there is some degree of uncertainty. The Supreme Court has said that unless Congress in creating a liability scheme expressly provides for contribution, a court will not infer it from the statute.

We believe that Congress intended there to be under Superfund a scheme in which joint and several liability and contribution go hand-in-hand, but because it is not absolutely clear, we think it is very important to the responsible parties that it be made absolutely clear in the statute.

The **Chairman**. Would DOJ's revised language for section 126 change current rules for civil procedures, and if not, why is this new language necessary?

Mr. **Habicht**. We do not believe that the new language to which I refer, which we will present in very short order to the Congress, would prohibit parties from bringing third-party claims in the case in chief under rule 14. That is their right under rule 14.

The law is fairly well settled that joint tortfeasors do not have a right to compel the joinder in the case in chief of other defendants. So in the fundamental sense, we do not think the section changes the rules of civil procedure.

To the extent that it may prevent the permissive joinder of parties into the initial Government's action, it may slightly change those rules. But we think for very sound policy reasons, and certainly consistent with the way Congress has addressed difficult issues in the past, it makes sense.

The **Chairman**. We will take about a 5-minute recess until Senator Simpson comes back, and he will proceed with his questions, and then Senator Hatch has some and maybe Senator McConnell.

[A brief recess was taken.]

Senator **Simpson** [presiding]. The hearing will come to order. If you wish to converse, please go in the hall. Thank you.

I have several questions I wanted to address, and the chairman will be back very shortly and we will continue with the hearing. I remember in hearings before the Environment and Public Works Committee especially a panel of the insurance industry, which was most interesting to all of us on the Environment and Public Works Committee on both sides of the aisle, where they were really saying that they are getting to a point where in some cases they are getting hit for damages under a risk that was never insured against, and that that is happening because of the various things we lawyers do, like deep pockets and insurance.

I have been on both sides of those issues as a plaintiff's lawyer and as a defense attorney. But in any event, there is a very real possibility that they are getting to a point, or some of them, where they just will not insure.

It is easy to say, you know, when you are filled with zeal and enthusiasm, well, you will insure. But they are still in business to make a profit and they will not insure, and I think we can easily come to that.

I think the great burden of the coverage is litigation expenses. I believe they have a fancy phrase for that now—transaction occurrences or some dazzling phrase like that—transaction whatever.

But a recent study for EPA indicated that public and private litigation expenses for the cleaning of CERCLA sites could range between 25 and 44 percent of overall cleanup costs. That is a rather extraordinary figure.

In addition to the question of whether lawyers and others should receive this much of society's resources which are allegedly directed to a very important social matter, there is the problem of whether that great sum of money could not best be invested in cleaning up the sites instead of cleaning up.

What studies do you have to share, Mr. Thomas, if any—and you can furnish this any way you wish, later or review it—what studies is the EPA, and Mr. Habicht, too, at the Department of Justice, presently performing concerning public and private sector litigation costs in this area, and how are we going to get a grip on this problem?

Mr. THOMAS. Senator, let me respond first. I want to provide you for the record the detailed analysis of that information and the 25 to 40 percent figure that you were quoting.

The majority of those moneys are actually not legal fees. They incorporate overall administrative expenses, management expenses, but the biggest part of them is they also incorporate all the engineering studies and technical work at the sites. A lot of that is site work not what I think you are referring to, which is really the legal fee part of it.

It breaks it down, and I would like to provide that information to you.

Senator SIMPSON. If you would.

Mr. THOMAS. Yes, sir.

[Material was subsequently supplied for the record:]

Question from Senator Simpson. A recent study for EPA indicated that public and private litigation expenses for the cleaning of CERCLA sites could range between 25 and 44 percent of overall cleanup costs.

Answer. It is assumed that the Putnam, Hayes & Bartlett study on litigation expenses under CERCLA refers to the testimony of John C. Butler, III on behalf of the American Insurance Association, provided to the Committee on Environment and Public Works on April 3, 1985. The testimony has not been analyzed in detail by EPA, but preliminary reactions have been that the conclusions, based as they are on numerous assumptions and uncertainties, are of limited reliability.

For example, the testimony states that the range of costs for the government and PRPs to settle or litigate Superfund cases was identified through a case study analysis. However, the testimony also states that the costs and frequency of occurrence of each possible case outcome was determined on the basis of "historical observations and expert judgment." Without reassurance that the bases for the expert judgments were accurate, the predictions as to future costs are not more than guesses. Specifically, the testimony cites costs of up to $1 million to private parties to litigate a contribution suit or to respond to judicial enforcement of an administrative order. Since EPA has no knowledge of any federal cases of those types that have actually reached the point where costs could be calculated, the $1 million must be based entirely on something other than actual analysis.

In addition to concern about the adequacy of case analysis to support the conclusions in the testimony, there is also concern about the correctness of various assumptions made. It is questionable that assuming an average of 25 PRPs per site is appropriate. It is also questionable whether the probability assignments for possible outcomes were proper. Since both of these assumptions are crucial to the cost calculations, the calculations cannot be given a great deal of credence without better support for the assumptions.

EPA is presently developing a study which would analyze in detail past federal government enforcement expenses under CERCLA. It is part of a larger project which will discuss alternate procedures for resolving CERCLA enforcement cases. Since the study is still in the development phase, and will involve extensive data collection, it will probably not be completed before 1986.

The 301(a) study produced by EPA reports that approximately 30% of Superfund spending over the next decade will be aimed at "transaction costs" (legal and administrative expenses). The 30% of Superfund spending that is called "transaction costs" includes all expenses, other than payments to contractors and States, for onsite removal and remedial response.

The figures cited in the CERCLA Section 301(a)(1)(c) Study (Extent of the Hazardous Release Problem and Future Funding Needs") were calculated through use of EPA's Superfund Budget Forcasting and Financial Flows models. In retrospect, the section of the Forecasting model entitled Administration and Enforcement is misnamed. A more accurate title would be Administration, Enforcement and Program Support. Removal and remedial support constitutes the largest component of the Program Support category and represents approximately 14% of total projected obligations over the next 10 years. Activities funded include initial site discovery and investigation, hazardous ranking, NPL listing, laboratory analysis and related costs associated with sampling efforts, investigations of potential removal actions, technical assistance and training to States and other parties involved in removal and remedial actions and program evaluation/control activities of the hazardous substance response program.

Work of the other Federal agencies also represents a significant portion of projected Program Support obligations, work of the Department of Health and Human Services, Department of Justice, U.S. Coast Guard, and others is projected to require approximately 4% of total obligations over the next decade.

Legal cost are considered to be a portion of the Agency's overall enforcement costs. Legal cost include the costs associated with: negotiations for privately financed response, development and issuance of administrative orders to compel responsible parties to respond, and initiation and support of civil, criminal and cost recovery cases referred to the Department of Justice; cost documentation and assembly; expert witness consultation and testimony; case preparation and presentation by DOJ attorneys.

In addition, there are enforcement support activities which the Agency has included in its projections. These include: data collection and analysis (e.g., water and soil sampling, engineering and geological studies), report preparation, quality control and assurance, including chain of custody.

Enforcement costs are expected to represent approximately 12 percent of total costs over the next decade. Litigation costs, which are a subset of enforcement costs, are expected to decline over the next decade. Clearly, most of the support activities described above would be carried out even in the absence of litigation. Now that the liability rules have been set, parties can focus their attention on remedy rather than on liability. Moreover, as remedies are reviewed on the record, the legal costs associated with challenging remedies will diminish. As for the support costs, these activities will be carried out even where there is no litigation. Many of the most expensive enforcement activities, such as data collection and review, quality assurance and control, and report preparation, will be carried out regardless of whether litigation occurs.

The Administration component of Administration, Enforcement and Program Support consists of those activities contained in the Management and Support portion of the Agency's Superfund budget. Activities include Headquarters and Regional financial and administrative management, space, utilities and related expenses, ADP support and costs of the Office of Inspector General, the General and Regional Counsels, Policy, Planning and Evaluation, and Comptroller. Together, these activities are expected to consume approximately 2% of total Superfund obligations over the next ten years.

Mr. THOMAS. We are, as you are, very concerned about the expenses that go into getting private party cleanup, both their expenses and our expenses, particularly the legal expenses. And the charge that the transaction cost, as you have indicated, outweighs the cleanup results we just do not find is the case by a long shot.

We do try to control those costs. In some of those cases, particularly the ones that are most contentious and most complex, those costs can go up pretty high when you have to bring in the kind of engineering and scientific experts that are required when you go all the way through litigation.

The majority of the cases never go to that point. The majority of the work that is done on those sites is actually a part of the cleanup remedy.

Senator SIMPSON. Thank you for that. I remember, too, that there was a question previously in the Environment and Public Works Committee asked about the performance of a judicial impact statement.

The Attorney General had recommended that and there was a discussion about it with Superfund, and at that time I think, Mr. Habicht, you stated that study was premature. Have there been any additional items or elements of progress on that? When might the Senate expect an analysis of the effects of Superfund on already crowded Federal court dockets that we are continually advised of here in this committee, which is a very definite reality? And will you have information on this in time for the Senate to consider it in our deliberations here?

Mr. HABICHT. Senator Simpson, we will certainly try to do that. As I indicated at that earlier hearing, we are extremely sympathetic—and certainly at Justice, we do not need any more work—we are very sympathetic with the concern about unnecessary litigation costs.

One of the things that we have started to do is to work with EPA to really break down the costs that have been cited to the committee. As a lawyer, you would agree that it would be nice to have the opportunity to put that person on the stand and sort of go through the assumptions, and so forth, and that is exactly what we are doing and what we will do for the Congress, to look at, as Lee Thomas said, what portion of this is actually in-court litigation costs.

Beyond that, I would just note two things beyond making a commitment to do whatever we can with the information we have to make predictions. We have used past experience as a basis for determining what kinds of things make sense for streamlining the enforcement process, and many of our provisions and others that we are open to would help to minimize litigation; to make litigation available, but minimize costly litigation.

One way is to have the administrative process, outside of the courts creating a record on the remedy, and the other is to make an assessment of litigation costs and whether they are justified, even though there will always be some litigation costs. At this point, we think our litigation costs are justified, in terms of the benefits of having an effective enforcement program.

Senator SIMPSON. Thank you. I want to ask just another question or two and then we will get on with the activity here. Another area that concerns me is that here we have in this legislation, this S. 51, a requirement that any suits by defendants in the case in chief against third-party defendants for contribution be delayed until the conclusion of the case in chief.

It seems to me that that runs absolutely counter to everything we see in the philosophy of the Federal rules of civil procedure, the aim of which is to promote total judicial efficiency through bringing together every single claim which is related to a specific set of facts.

Do you see that as a deviation from the Federal rules of procedure? What is your view on that?

Mr. HABICHT. Well, Mr. Senator, as I indicated in my oral statement, we have taken a look at the provision that is in S. 51 and we are preparing to propose changes to that provision that we think would bring it very much in line with current practice, perhaps with one minor exception.

We certainly support the idea under rule 14 of parties being able to bring any third-party claimants into the case in chief and to name them in the case. This sends clear notice to those other parties and gets them involved.

They also have a right to become involved in the litigation of the remedy. The putting off in terms of actual trial of the equitable apportionment part of the case is something that might in some circumstances be left to a judge. We think that if it is a deviation from current practice, it is a minor one, and one that is certainly justified in terms of the judicial benefits and the public benefits of having a logical process set by Congress.

It is logical in the sense, as I indicated in my testimony, that it does not make sense to have equitable apportionment until you know what the remedy is, and the significant evidentiary issues will be different from those in the case in chief.

The benefits, of course, are not only moving the case along, but also preventing a lot of skirmishing with regard to which third parties should be in or out, when the third parties are of so many kinds and characteristics in terms of their significance, and so forth.

Senator SIMPSON. I would also like to know—I will not ask it now, but I want you to tell me how you perceive the issues with regard to mandatory counterclaims under the Federal rules in the face of S. 51, because there is another divergence.

With regard to citizen suits, I have some other questions. I will submit those in writing.

I see that Senator Grassley is here. He may wish to express a question or two, but there are other questions for the record from several other Senators and I would ask that the witnesses answer those for the record, and do so early next week.

Can you do that for us, please?

Mr. HABICHT. Yes, sir.

Mr. THOMAS. Yes.

[The following was received for the record:]

Simpson Question #1

At the hearing today, Lee Thomas indicated that the Putnam, Hayes, & Bartlett study on litigation expenses under CERCLA may be flawed. Further, he indicated the EPA is currently studying the matter closely. Please provide any information on this topic, including a schedule of coming studies related to public and/or private litigation costs, and when they will be available for Senate consideration.

ANSWER

It is assumed that the Putnam, Hayes & Bartlett study on litigation expenses under CERCLA refers to the testimony of John C. Butler, III on behalf of the American Insurance Association, provided to the Committee on Environment and Public Works on April 3, 1985. The testimony has not been analyzed in detail by EPA, but preliminary reactions have been that the conclusions, based as they are on numerous assumptions and uncertainties, are of limited reliability.

For example, the testimony states that the range of costs for the government and PRPs to settle or litigate Superfund cases was identified through a case study analysis. However, the testimony also states that the costs and frequency of occurrence of each possible case outcome was determined on the basis of "historical observations and expert judgment." Without reassurance that the bases for the expert judgments were accurate, the predictions as to future costs are not more than guesses. Specifically, the testimony cites costs of up to $1 million to private parties to litigate a contribution suit or to respond to judicial enforcement of an administrative order. Since EPA has no knowledge of any federal cases of those types that have actually reached the point where costs could be calculated, the $1 million must be based entirely on something other than actual analysis.

In addition to concern about the adequacy of case analysis to support the conclusions in the testimony, there is also concern about the correctness of various assumptions made. It is questionable that assuming an average of 25 PRPs per site is appropriate. It is also questionable whether the probability assignments for possible outcomes were proper. Since both of these assumptions are crucial to the cost calculations, the calculations cannot be given a great deal of credence without better support for the assumptions.

EPA is presently developing a study which would analyze in detail past federal government enforcement expenses under CERCLA. It is part of a larger project which will discuss alternate procedures for resolving CERCLA enforcement cases. Since the study is still in the development phase, and will involve extensive data collection, it will probably not be completed before 1986.

3. The citizen suit provision in S.51 is limited to "non-discretionary duties" of the Administrator, and is not triggered by the "imminent and substantial endangerment" standard of RCRA. As a practical matter, how would the two citizen suit provisions interact. What impact will this have on CERCLA?

ANSWER:

The citizens suit provision in S.51 authorizes two types of actions that are of concern to the Agency:

-citizen suits against the president for failure to perform non-discretionary duties

-citizen suits against any other person who is alleged to be in violation of any standard, regulation, condition, requirement or order which has become effective pursuant to CERCLA.

These provisions are all individually troublesome, as was indicated in the written testimony of the Administrator and of Assistant Attorney General Habicht. In practice, administration of the program could become much more complex.

First, citizens can take enforcement action under RCRA for many sites on the National Priorities List that are potentially the subject of Fund-financed cleanup or enforcement action under CERCLA. The definition of solid and hazardous waste applicable for actions under section 7002 of RCRA overlaps substantially with the definition of hazardous substances applicable under section 106 of CERCLA. These RCRA citizen suits have the potential for disrupting Federal Fund and enforcement priorities under CERCLA, and for generating unfavorable legal precedents. Consequently, the government is virtually compelled to follow such actions closely, and to intervene where appropriate. These provisions could also seriously disrupt ongoing negotiations.

Second, the CERCLA citizens suit provision allows disruption of ongoing private party cleanup. The RCRA citizen suit provisions preclude citizen suits where the Agency is diligently pursuing an enforcement or cleanup action. By its terms, however, the citizens suit provision of CERCLA would allow citizens to sue to enforce an order, and probably consent decrees as well. Responsible party cleanup action is generally conducted under a CERCLA order or decree, whether unilateral or on consent. Citizens unhappy with the remedy or the progress of the responsible party cleanup citizens could sue to "enforce" the order or decree and in practice bring the responsible parties back into court leading to further delays and disruptions in the cleanup. In short, even if the enforcement action was diligently pursued and successfully completed, so that citizen suits were not possible under RCRA, citizens could sue under CERCLA.

Question from Senator Grassley
Section 133 of S. 51 precludes judicial review of any challenges to response actions selected under section 104 until an action under section 107 to recover response costs is commenced. If EPA has made an error in selection of a remedy, why should the parties objecting have to wait until the remedy has been constructed? If the public living near the site objects that the EPA's remedy doesn't go far enough to reduce the hazard, since their objection is irrelevant in a cost recovery action, can it ever be raised and how?

ANSWER:
Section 133 provides several opportunities for judicial review of Agency decisions concerning the choice of remedy. They include:

-imminent hazard lawsuits under section 106;
-actions to enforce orders issued under section 106;
-actions for reimbursement of costs by parties who have complied with administrative orders under section 106.
-cost recovery actions under section 107.

Thus, if the Agency takes enforcement action, there are opportunities for judicial review before the remedial action is taken. More significantly, the CERCLA enforcement process provides both the public and responsible parties with substantial opportunities for involvement in the choice of the remedy.

- The public and responsible parties are given an opportunity to comment on the inclusion of sites on the National Priorities List.

- Responsible parties have an opportunity to participate in or perform the remedial investigations and feasibility studies leading up to the choice of remedy.

- The public and responsible parties can comment on the proposed remedy for the site.

Comments from responsible parties and the public are part of the administrative record that the Agency must consider in selecting the remedy.

In light of these opportunities for public and responsible party involvement in the choice of remedy, the fundamental question is whether the responsible parties, or the public, should be able to delay cleanup because they disagree with the choice of remedy.

Where the Agency takes enforcement action, these opportunities are available, although the provisions for reimbursement make it more feasible for responsible parties to comply with orders and seek reimbursement afterwards. However, where Fund-financed cleanup is appropriate and must proceed quickly, it is inadvisable to give responsible parties and citizen groups an additional unnecessary opportunity for delaying the cleanup action by litigating the remedy.

Citizens are given substantial opportunities for involvement in the decision concerning the choice of remedy. Even if all citizen groups involved at a particular site do not accept every aspect of the remedy selected by the Agency, it is more important to allow cleanup to proceed than to delay it until every potentially interested party has been given an opportunity to litigate all of their concerns. This concern with delay is particularly significant if citizens could obtain pendant jurisdiction over state-law claims for personal injury or property damage.

Nothing in the amendments precludes citizens from participating in cost recovery actions under section 107. Citizen groups may also have an opportunity for judicial review of decisions to delete sites from the National Priorities List.

The rights of responsible parties are protected by allowing judicial review in cost recovery and reimbursement actions. Review before cleanup would entails delay in taking any cleanup action. Several cases supporting this proposition have been recently decided under CERCLA.

In Lone Pine Steering Committee, et al. v. U.S. Environmental Protection Agency, Civil Action No. 84-4513 (D.N.J. Jan.21, 1985) the court concluded that there is no jurisdiction under CERCLA to review a Record of Decision on remedy, on challenge by potentially responsible parties, before cost recovery action has been initiated.

In United States v. Outboard Marine Corp., No. 78 C 1004 (N.D. Ill. August 30, 1984), the government was granted a voluntary dismissal of its action to compel cleanup so it could instead conduct Fund cleanup and subsequently seek cost recovery. The court rejected an attack on the validity of the Record of Decision on remedy until the government sues to recover costs.)

Question from Senator Grassley
Section 133 amends section 113 of CERCLA to limit judicial review in cost recovery actions to the administrative record. Can this be done consistent with due process without a requirement that all EPA data and methodologies be in the public record available for comment? If new evidence in monitoring data from a site is developed after the administrative record is closed, how would parties bring it to EPA's attention and what requirement would exist that it be considered? How would it affect a cost recovery action.

ANSWER:
The review of the remedy in the cost recovery action would be based on the administrative record, as established at the time of the decision. The guidance, methodologies and information on which the Agency bases its decision will be available to the public.

However, further information concerning the site would generally be developed in the course of cleanup action. If this information indicates that the choice of remedy should be reconsidered, nothing precludes the Agency from reopening this question In any case, this information might be relevant for determining the actual costs that responsible parties would pay for the cleanup.

Question from Senator Specter

CITATIONS ON REMEDY CHALLENGES

- Lone Pine Steering Committee, et al. v. U.S. Environmental Protection Agency, Civil Action No. 84-4513 (D.N.J. Jan. 21, 1985) (no jurisdiction under CERCLA to review a Record of Decision on remedy, on challenge by potentially responsible parties, before cost recovery action has been initiated).
- United States v. Outboard Marine Corp., No. 78 C 1004 (N.D. Ill. Aug. 30, 1984) (government granted voluntary dismissal of its action to compel a cleanup so it could instead conduct Fund cleanup and subsequently seek cost recovery; court rejected attack on validity of Record of Decision on remedy until government sues to recover costs).
- Aminoil v. United States Environmental Protection Agency, Nos. 84-5853 and 84-5863 (D.Cal. Sept. 28, 1984) (plaintiff denied judicial review of CERCLA section 106(a) administrative order prior to commencement of enforcement action under section 106(b) or cost recovery action under section 107).
- Earthline Company v. Kin-Buck, Inc., Civ. No. 83-4226 (D.N.J. Jul. 23, 1984) (court dismissed for lack of jurisdiction action seeking to enjoin EPA's implementation of a section 106 order).
- J.V. Peters & Co., Inc. v. Ruckelshaus, 584 F.Supp. 1005 (N.D. Ohio 1984) (EPA section 104(a) response action may be challenged if claim of no rational basis or failure to follow mandated procedures is specifically alleged and supported by material facts; here, plaintiffs' complaint stated mere conclusions).

Simon Question 1
How long does it typically take EPA to formally notify PRPs that they have been identified by the agency as such?

ANSWER:
It is EPA policy to issue notice letters as soon as possible after completion of the PRP search and prior to any Federally-financed response actions. In the case of emergency actions, written notification may not be feasible, and only oral notification may be possible. A notice letter will immediately be sent confirming the oral notice, reiterating the pertinent facts and any agreements that were reached, and expanding on the party's responsibilities under CERCLA.

Notice letters will inform the PRPs that Fund-financed actions are planned and/or have been completed. Notice letters will provide PRPs with the opportunity to undertake future actions, and will inform PRPs of both their potential obligation under Section 106 of CERCLA to implement any needed relief actions determined by EPA and their potential liability under Section 107 of CERCLA for the cost of Fund-financed actions if they do not respond or fail to respond properly. PRPs will also be informed of their opportunity to discuss with Agency personnel the response measures to be performed.

At a minimum, notice letters for the RI/FS will be issued at least 60 days before the RI/FS commences. Notice letters issued for the remedy will be issued when the Agency has completed or is nearing completion of the RI/FS and approximately thirty days in advance of the public comment period on the RI/FS. More than thirty days may be appropriate if there exist a large number of PRPs at a site.

Notice letters will be issued in a timely manner so that PRPs will have sufficient time to organize themselves to assure responsibility for the RI/FS and cleanup. PRPs should have sufficient time to organize into a steering committee to speak on behalf of as many PRPs as possible when discussions on the RI/FS begin. Timing of notice letter issuance also takes into account the number of PRPs and the complexity of the data associating PRPs with the site. Regions allow sufficient time to collect and analyze data received from PRPs in response to the information request that may be contained in the notice letter.

2. Does the agency usually notify what it considers to be the primary PRPs before notifying those who might have less responsibility for pollutants at a particular site.

ANSWER:
It is EPA policy to send notice letters to every PRP at a site. The notice letters will inform the PRPs that Fund-financed RI/FS actions are planned; that the results of the studies will be used to select a remedy for the site; that PRPs can meet with Agency personnel to discuss their participation in or conduct of the RI/FS; that PRPs may be liable for the costs of the RI/FS performed by the government; and that PRPs will have an opportunity to meet with Agency personnel to discuss design and implementation of the remedy after completion of the RI/FS.

The Regions may, as a matter of program discretion, issue notice letters which request a different response from various PRPs. In some cases where a great number of PRPs exist, EPA may request a different response from those PRPs which EPA believes contributed most significantly to the hazardous substances at the site. For example: the case management team may select a "tier" of PRPs. The notice letter sent to this tier of PRPs may include an invitation to initiate negotiations with EPA, while the notice letter sent to the remaining PRPs may only request a written response.

The immediacy of the hazard at the site may limit the number of PRPs that will initially receive notice letters. This approach will facilitate negotiations with PRPs so that response actions can begin promptly. The Regions will later issue notice letters to the remaining PRPs, after the immediate hazard at a site has been abated.

3. Does the Agency routinely provide complete lists of all PRPs connected with a particular site to all other PRPs connected with that site? If so, is this list updated periodically?

ANSWER

Yes. As specified in EPA's Interim CERCLA Settlement Policy (50 Federal Register 5034), specific site information released to PRPs includes the identity of notice letter recipients, the volume and nature of wastes to the extent identified as sent to a site, and a ranking by volume of material sent to the site, if available. The list of notice letter recipients is updated as necessary.

4. Are PRPs given access to all data in EPA's possession concerning that PRP?

ANSWER

No. Actual evidentiary material is generally not released. In determining the type of information to be released, the possible impacts on any potential litigation must be considered. In addition, protection of confidential and deliberative materials must be assured. Question 3 describes information that is routinely available to PRPs.

5. How many RI/FSs are currently being performed by PRPs? How many are being performed by EPA?

ANSWER

Currently, 31 RI/FSs are being conducted by PRPs. In addition, there are 75 Fund-financed, enforcement-managed RI/FSs going on. Since December 1980, 342 Fund-financed RI/FSs have been started. EPA estimates that a large percentage of these are still ongoing.

6. Why do RI/FSs often take two or more years to complete?

ANSWER:

EPA must undergo a complex and time consuming decision making process for selecting and implementing an appropriate remedy at uncontrolled hazardous waste sites. This process requires initial planning to take the specific site conditions into consideration when developing a plan of action for the site. Once a plan has been developed and approved, collection and analysis of samples must occur, in order to properly document the type and extent of contamination. An important aspect of this data analysis is the quality assurance/quality control (QA/QC) procedures that must be followed to ensure proper data is used to develop remedial alternatives. Upon receipt of this validated data, remedial alternatives must be developed which follow the procedures outlined in the NCP and other applicable environmental legislation and regulations.

EPA has prepared a study that documents the time required and possible causes for delays that affect implementation of the RI/FS process. By identifying these sources of delay, EPA can learn from Superfund program experience to date, and develop management and technical approaches to reduce these delays.

The analysis shows that an average Federal-lead RI/FS lasts over 19 months, from issuance of a work assignment to submission of the final FS report. The average State-lead RI/FS lasts nearly 23 months. Specifically, the analysis has found the following common sources of delay to include:

- Delays in Contract Laboratory Program processing of site samples;
- Delay in quality assurance of laboratory data results;
- Longer than anticipated time to develop, review and approve contractor work plans;
- Inadequate performance by subcontractors; and
- Additional requirements imposed by evolving Agency policy and regulations.

In response to this study, EPA is now developing and implementing several changes to the RI/FS process. Further analysis and improvements are anticipated as EPA continues to evaluate the RI/FS process over the next several months.

7. Please outline EPA's procedures for monitoring RI/FS's by PRPs.

ANSWER:

The RI/FS work plan developed by PRPs in accordance with EPA documents Guidance on Remedial Investigations Under CERCLA and Guidance on Feasibility Studies Under CERCLA is subject to review, modification, and approval by EPA.

The work plan contains a schedule for implementation of the RI/FS tasks. PRPs must submit written progress reports to EPA according to the work plan schedule. PRPs must submit preliminary and final reports to EPA according to the schedule in the work plan. EPA reviews these reports and notifies PRPs of its approval or disapproval. In the case of disapproval, PRPs have a specified time period to modify and resubmit the reports.

In the course of the RI/FS, EPA may determine that additional tasks are necessary and the PRPs shall implement the additional tasks, reporting, deliverables, etc. according to schedule.

Throughout sample collection and analysis, EPA monitors PRP activites to ensure that quality assurance, quality control, and chain of custody procedures are in accordance with EPA Standard Operating Procedures.

EPA has the authority to enter and freely move about all property at the site to review progress of PRPs in carrying out provisions of the workplan, to verify data submitted to EPA by PRPs, etc.

EPA designates a project coordinator as EPA's representative at the Site to oversee the implementation of the work plan.

The above provisions are generally found in administrative orders negotiated between EPA and PRPs.

8. Why does the agency require PRP's to commit in advance to implement the remedy selected by the contractor performing a PRP-funded RI/FS?

ANSWER:
In general, the Agency does not require PRPs to commit in advance to implement the remedy selected by the Agency (not the contractor) in performing a PRP-funded RI/FS. In situations where a site is not on the Remedial Accomplishments Plan (described below), the Agency will sanction private-party RI/FS if the PRPs also agree to design and implement the remedy selected by the Agency.

As described in the memorandum, "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies under CERCLA" dated March 20, 1984, it is EPA policy to allow private parties to conduct RI/FS under certain conditions. The Remedial Accomplishments Plan (RAP) developed by the Agency identifies candidate sites for enforcement or Fund-financed response, and allocates the resources necessary to undertake these activities. The Remedial Accomplishments Plan lists all sites for which RI/FS will be developed.

PRPs will have an opportunity to conduct the RI/FS for sites on the RAP, provided that they respond before the scheduled date for obligation of funds and that they meet the following conditions:

> Where several parties are involved at a site, they must be able to quickly organize themselves into a representative body to deal with the Agency as a single entity. To facilitate this process, the Agency will make the names of PRPs available on request.
>
> PRPs must agree to follow the scope of work for the RI/FS developed by the Agency.
>
> PRPs must demonstrate to the Agency that they are able to follow the technical procedures described in the Remedial Investigation and Feasibility Study guidance manuals.

If these conditions are met, the Agency will devote the resources necessary to oversee and review the privately-conducted RI/FS. The Agency will also review the completed work product, assess the various alternatives under consideration, and choose the remedial alternative that best meets all applicable requirements of CERCLA.

The Agency will sanction private-party RI/FS for sites that are not identified on the RAP if the PRPs also agree to design and implement the remedy selected by the Agency. The Agency will allow private party development of the RI/FS because the resources that would have been dedicated to negotiations with PRPs for the remedial design and construction can instead be used to oversee and review the privately-conducted RI/FS. Thus, PRPs may conduct the RI/FS for any NPL site (even if the site is not listed in the RAP) if they commit to the complete cleanup as well.

Question 9: Compared with other EPA enforcement programs, do regional staff have greater or lesser decision-making discretion? Do senior regional staff and EPA's Washington staff have a greater day-to-day role in the Superfund program than they do in other programs?

Answer: Initially, it should be noted that comparisons between CERCLA and other enforcement programs may not be completely illustrative because CERCLA is a remedial program, while other statutes administered by the Agency are primarily regulatory. Another significant difference is that the other programs (e.g., air, water, RCRA) contemplate delegations of the program to the States. In those programs, EPA performs more of an oversight function, while in CERCLA cases, EPA usually maintains the lead in developing and prosecuting cases.

Regional staff probably have lesser decision-making discretion than in other programs for several reasons. Most important, CERCLA is still a relatively new program. Additionally, CERCLA cases are more complex, both technically and monetarily, than cases in other programs, and often attract national attention. CERCLA cases frequently present issues of precedential significance. Thus, the need for national consistency is more pronounced in the CERCLA program. To ensure such consistency, both senior regional staff and EPA's Washington staff play a greater day-to-day role in the running of the program. This may also be true because of the historical development of the program. Originally, the Agency's hazardous waste enforcement efforts were directed by the Hazardous Waste Task Force, which was run from EPA's Washington office.

As the CERCLA program has matured, Headquarters has delegated decsion-making authority to the Regions. For example, the Regions no longer must obtain Headquarters concurrence for certain CERCLA section 106 administrative orders. As the program continues to mature and the Regions continue to gain further experience with it, further delegations will occur.

10. How does EPA decide which of the enforcement tools at its disposal will be used in a specific case? That is, how does the agency decide when to proceed by administrative order as opposed to a lawsuit, etc.

ANSWER:
In general, orders should be issued in those situations where compliance with the terms of the order is feasible. This does not require the agency to make a pre-issuance determination that the respondents will comply with the order, but that compliance is practicable. Refusal to comply in such circumstances might render the respondent liable for penalties in the event of Federal cleanup.

The Federal government considers a variety of specific factors in considering whether orders or litigation are preferable. The following factors would tend to favor the use of administrative orders:

- the needed response action and the liability are clear and straightforward;
- the responsible parties have adequate financial capability;
- there are relatively few potentially responsible parties;
- the response action is reasonably specific;
- there is no need for long-term court oversight;
- the responsible parties do not have a record of non-compliance;

In any case, the Agency should be prepared to litigate the merits of the order.

Senator SIMPSON. Senator Grassley, did you have any questions you wanted to ask?

Senator GRASSLEY. Yes, I do. I would like to preface my questions with the fact that I was only able to hear a part of your testimony, and I apologize for that. I would like to also say that part of my responsibility here on this committee is as chairman of the Administrative Practices and Procedures Subcommittee of the full committee.

From that standpoint, we have jurisdiction over the Administrative Procedures Act, and in regard to that approach section 117 of S. 51 would amend section 104 of the statute to provide "an opportunity for a public meeting" and "a reasonable opportunity to comment" to the public with "a reasonable explanation of the proposal and alternative proposals in the notice of meeting."

This is inconsistent with the APA amendments passed by the Senate in S. 1080, and that was 3 years ago—and, of course, that bill did not get through the House—which would provide an opportunity for oral presentations of data, views and information to examine agency personnel or consultants who prepared the agency position; require factual and methodological material be placed in the record; and for judicial review of agency final actions, similar to the current APA section 706.

If EPA remains free to respond to agencies, why should the Senate exempt the agency from the requirements included in S. 1080?

Mr. LUCERO. Senator, if I might answer that, the provision you are referring to is a public meeting to receive comments for the purposes of selecting a remedy, and this is the stage of the process at which comments are received from the citizens in the neighborhood that is being affected as well as any responsible parties, and anyone else who has an interest at that site who wishes to provide comment.

This is not in the nature of a regulatory decision. What it is is taking comment on the selection remedy in order that we can move forward to the cleanup. The kinds of things that you have stated in your question are all things that can be presented, but the process is not quite as formal; it does not have fixed time lines and an automatic review process.

The purpose there is to receive comments in making the final decision. The next step is to start the cleanup, and we are not setting up an adjudicatory process whereby the decision on the selection of remedy will be subject to a court review and potential appeals.

It is a different process. That is why the two provisions are not similar.

Senator GRASSLEY. And your justification is that it is just because you are not going through the process of rulemaking that they should not be similar, right?

Mr. LUCERO. That is right, sir.

Senator GRASSLEY. Now, section 133—that is on pages 105 and 106 of S. 51—precludes judicial review of "any challenges to response actions selected under section 104" until "an action under section 107 to recover response costs is commenced."

If EPA has made an error in the selection of a remedy, why should the parties objecting have to wait until the remedy has been constructed?

And let me also say you might as well answer a second question at the same time. If the public living near the site objects that EPA's remedy does not go far enough to reduce the hazard, since their objection is irrelevant in the cost recovery action, can it ever be raised, and if so, how?

Mr. LUCERO. Sir, if I might start by answering that, I think Mr. Habicht may also want to provide part of the answer. The thing to keep in mind here is that—there is sort of a competition of different interests.

The very important thing that the agency has been directed to do is to proceed as rapidly as possible to achieve the cleanup of that site. That is one interest that is pushing us.

There are differences of opinion as to what the correct remedy may be. What the agency tries to do is to involve both the opinions of the citizens and the opinions of the responsible parties very early in the process.

There is a formal process that has been established in Agency guidance and which has been proposed in revisions to the national contingency plan, the major regulation that implements the Superfund Program, for a mandatory community relations process which allows, at the time the site is listed, up through the analysis that assesses the remedy, up through the comment period and beyond, for citizen participation.

The agency also has a process whereby the responsible parties are invited to come in as early as possible. In fact, they are given an opportunity to do the studies and to do the analysis as to the remedy that should be selected.

The way we see the process working is that——

Senator GRASSLEY. I will have to interrupt you just a second.

Mr. Chairman, we must have had two votes back to back.

The CHAIRMAN [presiding]. That is right, and now this is another one.

Senator GRASSLEY. OK. You can continue your answer for the record, but I have one more question I would like to ask.

The CHAIRMAN. Go ahead and ask it.

Senator GRASSLEY. I can ask it now?

The CHAIRMAN. Sure.

Senator GRASSLEY. And then you will have to answer while I am not here and I will have to read it in the record.

Section 133—again, that refers to the same one you are now responding to—amends section 113 of the act to limit judicial review in cost recovery cases "to the administrative record."

Can this be done consistent with due process without a requirement that all EPA data and methodologies be in the public record, available for comment? Also, if new evidence in monitoring data from a site is developed after the administrative record is closed, how would parties bring it to EPA's attention, and what requirement would exist that it be considered? How would it affect a cost recovery action?

I will just have to apologize because I did not realize that I was in the middle of a vote or I would not have started out.

Mr. **Lucero**. Senator, perhaps it would be best, since you are going to read this in the record anyway, if we provide the answer in writing because it is a fairly complex question.

The **Chairman**. Is that satisfactory, Senator?

Senator **Grassley**. Yes.

[The material was subsequently supplied for the record:]

Question from Senator Grassley. Section 133 amends section 113 of CERCLA to limit judicial review in cost recovery actions to the administrative record. Can this be done consistent with due process without a requirement that all EPA data and methodologies be in the public record available for comments? If new evidence in monitoring data from a site is developed after the administrative record is closed, how would parties bring it to EPA's attention and what requirement would exist that it be considered? How would it affect a cost recovery action.

Answer. The review of the remedy in the cost recovery action would be based on the administrative record, as established at the time of the decision. The guidance, methodologies and information on which the Agency bases its decision will be available to the public.

However, further information concerning the site would generally be developed in the course of cleanup action. If this information indicates that the choice of remedy should be reconsidered, nothing precludes the Agency from reopening this question. In any case, this information might be relevant for determining the actual costs that responsible parties would pay for the cleanup.

Mr. **Habicht**. I might just add that we are very interested in your thoughts on section 133, and we are pleased that this committee is considering it. There are very difficult choices to be made with regard to encouraging unnecessary litigation and having courts second-guessing very technical and difficult decisions, but at the same time having a process that is adequate from an administrative law standpoint. And so we are happy to present our thoughts on it and would be interested in yours.

Senator **Grassley**. Thank you very much.

The **Chairman**. Mr. Thomas, should citizen suits be allowed to override EPA prioritization and enforcement policy, and what, if any, disruptive effect on established EPA priority do you see as a result?

Mr. **Thomas**. Senator, I think it could create a substantial disruption in the process, actually slowing down cleanup by the amount of litigation that I think may be brought. Clearly, it could have an impact on our priorities.

I think that where suits are brought, regardless of whether we had selected that as an enforcement action to be brought, we would have to look seriously at entering that suit and would enter that suit.

So I think it will have a substantial impact on the program, unlike other environmental programs. I think the Superfund Program—a site cleanup program, with the hundreds and thousands of sites we will deal with—will prompt hundreds and thousands of citizen lawsuits.

The **Chairman**. Mr. Habicht, how do you feel about it?

Mr. **Habicht**. I do not really have much to add, Senator. I think that the——

The **Chairman**. Do you agree with Mr. Thomas' position?

Mr. **Habicht**. By making the lawsuits available, they will certainly happen, and they are of questionable validity in view of the fact that they would impede what the Government is trying to do.

The CHAIRMAN. Now, Mr. Thomas, is it not true that the citizen suits in the other environmental laws were established for and intended to specifically apply to the licensing or regulatory scheme of that particular law, and is not this citizen suit provision, in effect, an entirely different mechanism?

Mr. THOMAS. Well, I do think it is substantially different in Superfund, although the provisions in some of our other environmental statutes, I think, have been broadened, particularly of late.

We do have major reservations, as I stated, about incorporating it into the Superfund Program. I think it is substantially different.

The CHAIRMAN. We will have to take a recess for a few minutes. We all have to vote. We will be back as soon as we can.

[A recess was taken.]

Senator HATCH [presiding]. Senator Thurmond has asked me to continue the hearing until he returns.

Let me ask you, Mr. Habicht, under section 126 of S. 51, a responsible party may bring an action for contribution against jointly responsible parties, as I understand it. A limited right of contribution would be, I think, a more fair way of stating that.

That contribution action, however, is precluded, as I understand it, until after a judgment or good-faith settlement. Am I correct so far?

Mr. HABICHT. That is right. The actual hearing of those claims is postponed.

Senator HATCH. My question, is would not this provision, as presently constituted within the law itself—would not that provision precluding contribution actions until that time inhibit settlements and place unfair burdens on the first party sued?

Or to put it another way, would it not be better to allow any party, within our open system of jurisprudence, the right to bring in any other party that might be responsible so that everybody is out in the open?

This is generally the way most matters are settled in complex litigation matters; it also allows for more contribution, more money brought to the table, and more opportunity to resolve, and more issues discussed.

If you just discuss the partial issues, with a limited number of defendants, and allow no third-party rights, in essence, until after judgment or until after a good-faith settlement, then it seems to me that is a very backward way of going about bringing true equity in the law.

Mr. HABICHT. Well, Senator, I appreciate your concerns and it is a very difficult kind of weighing of costs and benefits in an area of litigation which is——

Senator HATCH. Well, I do not see how you can find much benefit from not giving the full right of contribution up front in a bill like this where you have malfeasors or have negligent defendants who are potential third-party defendants. These parties ought to be brought in and they ought to be given every right to participate under the law.

I understand the Supreme Court has held that there is no right of contribution in antitrust matters, but I question the constitutionality of not being allowed to bring in true third-party dependants.

Mr. HABICHT. Well, Senator, there are two very brief responses to that. First of all, we are proposing to revise the provision in S. 51 so that it is clear that parties have the right to file their complaint and join the third parties in the case in chief.

Senator HATCH. But only after judgment or settlement.

Mr. HABICHT. No, no. That is true in S. 51, but in the provision that we would propose as a revised provision, they would be able to file their third-party complaints and join third parties in the case in chief immediately upon their being sued. It is only the sequence of evidentiary presentations which is——

Senator HATCH. You are saying we should insert that provision in, then, and change this provision?

Mr. HABICHT. It has not gone through the formal administration review process.

Senator HATCH. Would you be for full rights of contribution, then?

Mr. HABICHT. Just to clarify—it would be the full right to bring any parties that they wanted into the case in chief.

Senator HATCH. At any reasonable stage of the litigation?

Mr. HABICHT. At any reasonable stage of litigation, subject to some controls on the actual hearing of these claims because of the dynamics of this kind of litigation.

Senator HATCH. An argument has been made that allowing contribution actions early in the litigation may make it more difficult to manage the litigation, and that may be one of the reasons the Government has taken the position it has thus far.

Could not the problem be solved by simply allowing parties under the Federal Rules of Civil Procedures to implead other responsible parties? The Government itself would then not have to sue them all. It could rely on the defendants sued to bring these other parties in—maybe the defendants are the only ones who really know, under certain circumstances, who to implead.

It seems to me that such a plan would work; it would be beneficial. It would redound to the benefit of the Government and ultimately to the disposition of these types of cases.

Mr. HABICHT. The right to implead and to have them in the case is certainly something that we support, and it is only in the context of a multiparty site where you may have an additional 200 or 300 generators who are responsible for minute—and may not, in fact, on review, be responsible parties—that we are concerned about the Government's case in chief.

Senator HATCH. But you do not know until litigation is brought to bear and until an opportunity is given to present both sides of the case.

Mr. HABICHT. This really goes to the question of prosecutorial discretion, as I say. From our standpoint, Senator, since we sue a substantial number of parties in each case, the trial of the case in chief will involve the most significant parties.

Senator HATCH. I understand, but if all parties are not impleaded in the case or a right to implead all parties is not given, it seems to me that the parties that are sued will have much less desire to settle on the basis that they are going to be held liable than they deserve.

Will parties in a subsequent contribution suit not challenge, then, every aspect of the terms of an earlier settlement? I think that, in turn, will result in more litigation and less incentive to settle at the outset, which is what we really want.

We want to get these settlements; we want to have these people cooperate; we want not to have delay after delay after delay.

Mr. HABICHT. I agree completely. As I indicated, Senator, the revised provision allows all these parties to be brought into the case in chief, so they will be parties to the case in chief. The third parties will have the opportunity to litigate the question of remedy, and so forth, so that they will all be in the case and only the actual apportionment issues will be put off.

It was for the reasons that you described that we wanted to be sure that these parties would be able to be brought into the case in chief.

Senator HATCH. The problem with what you are suggesting is, as I understand it, under your contribution proposal it would only allow EPA, to authorize contribution.

Why would it not be a better situation to allow the judges to authorize contribution? They are the impartial in this particular matter, or at least they are presumed to be impartial.

Mr. HABICHT. Under our proposal, the judges would oversee the actual equitable apportionment phase of the case. And as I say, the defendants would be able to bring into that equitable apportionment phase every party that they saw fit to bring into the case.

Senator HATCH. As I understand it, section 138 of S. 51 allows any person, any civilian, any individual citizen to sue any other person violating CERCLA. There is great of concern about endless "citizen suits" which could be disruptive of the Government's plans to resolve some of these problems and which could be disruptive of the overall goal to encourage private cleanup settlements.

What is your position with regard to citizen suits? It seems to me that citizen suits ought to be allowed to force EPA to do its job if EPA is not doing its job. But to allow private attorneys general to bring suits anytime they feel like they want to against anybody they want to for any reason, rightly or wrongly, is not only ridiculous; I think it is a bad precedent to establish in the law.

Mr. HABICHT. Well, Lee Thomas may have a very practical perspective on this. From the standpoint of being the law enforcers, we are very concerned about vesting that kind of prosecutorial discretion in citizens' groups because they will certainly——

Senator HATCH. I am really concerned about it. I think it is a real mistake.

Mr. HABICHT. They will certainly avail themselves of the opportunity, and the question is whether there is a real need for it. Is there something broken that needs to be fixed, because when you create a new right of action for private parties, particularly in an area like this, as I indicated, they will avail themselves of it and it will be very burdensome.

The Government will have to spend time monitoring these cases and deciding whether to get in themselves.

Senator HATCH. If you want to gum everything up and slow the process down, if you want to allow special-interest citizen suits to be brought against anybody at any time under any and all circumstances, that is what this bill seems to do.

I have no problem with allowing citizen suits against the EPA if the law is not enforced. I do not think you would have any problem with that, would you?

Mr. THOMAS. Yes, sir.

Senator HATCH. You would have problems with that?

Mr. THOMAS. In a couple of respects; let me mention what they would be.

Senator HATCH. But do you not have problems with what I have raised then, too?

Mr. THOMAS. No. I agree with that completely; I agree with your position completely.

Senator HATCH. OK.

Mr. THOMAS. I just wanted to make one point on the citizen suit against the EPA Administrator. As it is phrased, it is for performing nondiscretionary duties. The problem I have with that is that we incorporate numerous nondiscretionary duties within the statute—nondiscretionary duties which I will sit here and tell you there is no way I can meet, and deadlines I cannot meet.

Senator HATCH. Well, I think that is a legitimate concern.

Mr. THOMAS. The end result is litigation upon litigation against me, actually slowing down the whole process of trying to get on with cleaning up these sites.

Senator HATCH. So it is safe to say that both of you are concerned about unlimited citizen suits, the way the bill is presently written, and you would prefer to have that provision changed?

Mr. HABICHT. That is correct.

Mr. THOMAS. That is correct.

Senator HATCH. Well, I think it should be changed as well. I say if we are going to have citizen suits at all, we should let the citizens sue to require the agency's enforcement of the statute. We should not allow them to have the right to gum up the courts with all kinds of suits just because they feel they can bring suits. We should not give them the rights of private attorneys general in this matter, especially in this particular area, because all it means is more litigation with fewer results and less potential for settlement.

Would you both agree with that?

Mr. HABICHT. I would agree. I would echo what Mr. Thomas said. Knowing the kinds of responsibilities that EPA has and the kinds of discretion in judgment that goes into it, I am a bit concerned with the notion of citizens suing to get EPA to do its job.

Certainly, the Government should not have absolute carte blanche and there are instances in which citizens have an appropriate role in being sure the Government does its job. But in certain areas of law enforcement and in technical areas like these, again, if you provide the opportunity for challenge, citizens will avail themselves of it and you have to look very carefully at whether the costs are worth it.

Senator HATCH. In view of the fact that the industry will have agreed to transport hazardous substances from their original disposal site to an RCRA-regulated secondary site of the Government's choice at great expense, and will have disposed of those hazardous substances in accordance with the national contingency plan promulgated by EPA pursuant to CERCLA, would it not be wise to grant industry a release from future liability at the secondary site?

Mr. THOMAS. Senator, the position we have taken on that is that the more confidence we have in the remedy, the more willing we are to give a full release. The technology available today is improving steadily as far as confidence is concerned.

The problem we have when you transport your waste to a RCRA facility with relieving you from liability for that waste is that you basically find yourself in the position of everybody else who has taken their waste to that RCRA facility whose liability is not being relieved.

I do think clearly, as I indicated earlier, that when the Government, if ever, brings a case at that facility, the facts of the earlier cleanup and the actions by the responsible party would weigh in very heavily.

Senator HATCH. Well, I think that if you are always the Administrator of EPA, I might feel some confidence in what is going to happen. But you may not always be the Administrator, you see. We may not always have a reasonable person like you operating the EPA.

So I am concerned because there will be liability on the RCRA facility, and that is where the liability should lie. If it is an approved facility, if it is doing the job in the interest of promoting settlements and resolving problems, it seems to me there ought to be the full right of negotiating a release and it ought to be a provision that is more often used than not.

You do not disagree with that?

Mr. THOMAS. I think it is a legitimate concern; I share it. I would only moderate it a little bit to promote the best remedy.

Senator HATCH. There has been some criticism about this bill with regard to orphan shares; that is, is a portion of the cleanup responsibility properly allocated to a party who is bankrupt or otherwise unable to meet any liability or damage responsibilities?

Now, EPA, as I understand it, currently avoids using Superfund money to pay such orphan share costs. Am I right or wrong?

Mr. THOMAS. That is generally the case, Senator, even though our most recent settlement policy specifically states now that we will allow the use of Superfund money and we will settle for less than 100 percent.

Senator HATCH. OK, but your policy right now is not to.

Mr. THOMAS. No, sir. It is.

Senator HATCH. OK.

Mr. THOMAS. We modified that policy just recently, and we incorporated that change in it.

Senator HATCH. OK, because I think it is unjust to require solvent parties to pay shares of cleanup that they are not responsible for to begin with, or should not be responsible for. I think that causes discontent and animosity towards bills like this. Would you agree with that?

Mr. THOMAS. It does cause a lot of discontent. The problem is it drives right back against the joint and several liability provisions, and moderating how you use that authority, I think, is the key, Senator. I think what we would like to do is to use our Fund more aggressively in those partial settlement cases or mixed-fund cases.

I think that if the Congress agrees with us, we would like a clearer sense of direction from you, if you think that is the direction.

Senator HATCH. I think that is good because as I understand it, the Fund itself is a collection of private moneys.

Mr. THOMAS. Largely.

Senator HATCH. Largely, I see. Well, then, I think the Superfund should explicitly allow its moneys to pay for such shares. Do you disagree with that?

Mr. THOMAS. No, sir.

Senator HATCH. You do not disagree with that. You know, I think there will be a resistance for companies to pay more. I think some of the companies are willing to do a little bit more for insolvent companies if it is a voluntary right. But if you start making it a mandatory right, then they start to resist and then you have, again, another impediment towards resolution of these problems.

As you say, you have been doing a very good job in resolving these problems and getting monies, and I think you made a pretty good case with the charts you had at the beginning of this.

Another issue that has been raised involves the prohibition on pre-enforcement review in section 133. As I see it, that affects important rights of potentially responsible parties in two respects.

First, it would deny pre-enforcement review of administrative orders issued under section 106. The second problem that I have with it is the provision bars review of the selection of remedial action under section 104, except, as I understand it, in a cost recovery action.

Is that a correct statement?

Mr. THOMAS. Yes.

Senator HATCH. This provision, it would seem to me, would go beyond the needs of EPA to assure prompt cleanup, and my real problem with it is it does seem to conflict with the basic needs in these matters or basic notions of fairness and due process.

Do you agree with me on that?

Mr. THOMAS. Senator, it is a difficult issue. It gets to the heart of how we can use the administrative order authority that you have given us in the statute, which is critical to the success of the program; how we also can use the penalty authority provisions you have given us, which are critical to the success of the program.

Hank, you may want to respond to it, and Gene as well.

Senator HATCH. Yes, I would like to have you respond also, Mr. Habicht.

Mr. HABICHT. Senator, if I might just address that briefly, particularly in the context of the concern about citizen litigation and private litigation, if you have a pre-implementation lawsuit to challenge a remedy, presumably the purpose of that lawsuit is to get a court to order EPA to do the remedy differently.

Necessarily, in a lawsuit like that, you are going to be asking the court to stay EPA's hand or do something to preserve the status quo so that when the litigation is over, you can get the relief you wanted, which was to get EPA to do the remedy differently.

If your desire is not to get EPA to do it differently, but is rather just to make sure that you are liable for less than what you were afraid you might be liable for, then it does not make much difference whether you do it before or after implementation; you get the same day in court.

We are very concerned that if you have a day in court before implementation of the remedy, such that the parties will be asking the court to say, wait a minute, we want EPA to do it differently, then you really will be holding up implementation of these cleanup remedies in a dramatic fashion.

Senator HATCH. Well, as I understand it, section 133 would prevent persons subject to an administrative order from seeking judicial review of that order unless and until EPA sought to enforce that order in the particular court, notwithstanding the fact that compliance may involve the expenditure of millions of dollars in any given case and violation of such order would be punishable by treble damages, as I understand it, and fines of $5,000 per day. Is that correct?

Mr. THOMAS. Yes.

Mr. HABICHT. Senator, if I might just——.

Senator HATCH. Allow me to add just one other thought.

This limitation on judicial review would apply despite the fact that EPA has generally issued these orders, in the eyes of some of the companies, with what they consider to be minimal disregard of the rights of due process, as usually only what they refer to as a "quick right to confer" is offered.

So the section that I am complaining about exacerbates that particular limitation on due process rights in that judicial review of any issues concerning the adequacy of a response action taken or ordered by the President is to be limited to the often minimal administrative record with an "arbitrary and capricious" standard of review.

Do you differ with anything that I said there?

Mr. HABICHT. I might just address that by saying something I said to Senator Grassley earlier, which is that what we are looking at is setting up a regularized administrative process that allows a reasonable degree of access to data and opportunity to comment by responsible parties before any enforcement action is taken.

Then, in return for that, there would be record review at some point later. That is something Mr. Lucero might want to amplify on.

With regard to administrative orders, that is the toughest circumstance in which we face this issue. I think with regard to remedial action, and so forth, it is not a difficult issue. Here in S. 51, we offer the right for parties who do go ahead and implement the remedy and spend the money to be able to sue EPA for reimbursement if they feel they spent more than they needed to or something like that.

Also, the treble damage provision is not automatically applicable, and we would be very interested in the committee's thoughts about standards by which treble damages would be applied.

Senator HATCH. Am I right in saying that section 133 would also cut off the rights of potentially liable parties from seeking judicial review of an EPA decision to incur fund expenditures at a site under section 104 unless and until EPA seeks to recover its costs for such a site in court?

Review before the money is spent may be the only effective way or means to test and assess the appropriateness of the response action. Am I right in making those comments?

Mr. LUCERO. That is correct, Senator, and that is also the law as the courts have currently interpreted it in the few cases that they have looked at.

Again, to emphasize what has already been said, the reason it is of concern here is that the kind of judicial review that many parties have tried to seek of the selection of remedy is a litigation that can last months, if not years.

That means that the cleanup of that site would be stopped pending that litigation. That does not seem to be consistent with the direction that the Congress has given us, and they have an opportunity during the cost recovery action to challenge selection of the remedy. The Agency at least has decided to go through extensive processes of taking their comments and involving them in the process so we know what their concerns are way up in front of the study phase and all the way through the selection of remedy.

And if a court somewhere down the line should decide that we made a mistake in the selection of remedy, the risk will shift to the Government that we will have put in the wrong remedy. We may have to correct it. We may not be able to hold them liable.

But we think that is a reasonable balance, given the direction that we should proceed expeditiously with the cleanup. And we think it is during cost recovery time that the parties have the right to challenge that decision.

We are trying to balance the need to keep the cleanup program going with an opportunity to have a hearing, and in at least one case that I would mention—and we can provide it to the committee if you are interested—in the *Riley Tar* case, the court has taken up this issue of due process and whether or not there is a requirement for a preimplementation hearing as an aspect of due process.

The court in that case basically was saying that so long as there is ample opportunity at some point in the process to raise the issues and have them fairly litigated, they can do it, and the current scheme that we had the court found to be constitutional, to meet the mandates of due process.

Senator HATCH. Again, am I right in asserting that the judge in a cost recovery action reviewing expenditures that have already been made, it seems to me, is less likely to uphold a challenge to the nature of the completed response action even if it is gold plated?

Am I right in making that assertion?

Mr. HABICHT. I would not necessarily agree with that, Senator.

Senator HATCH. Well, is it not true that a preenforcement challenge may also be grounded on the belief that a different remedial alternative better protects the environment?

Mr. HABICHT. Well, that is one of the concerns that we have expressed. Certainly, as you indicated in your question about citizen suits, if you allow anybody who is interested to come in and seek to second-guess in court what EPA is trying to do, you will get a lot of people, responsible parties and others, who will come in and say, I think EPA should do more, I think EPA should do less, and you will have extensive litigation with quite a few parties holding up the remedial action.

That is a policy choice that needs to be made, but I think it is a reality that needs to be recognized. With regard to review after the remedy is implemented when EPA has done what, in its judgment, it believes is adequate to protect public health, I think a court under an arbitrary and capricious standard, under prevailing law, is obligated and authorized to take a careful look at what EPA did to make sure that it was lawful, reasonable and based on the administrative record. So I think judges will not be shy to take a hard look at that.

Senator HATCH. I have other questions, but I feel like I have taken too much time, so we will turn to Senator Specter. As soon as you have completed, Senator Specter, perhaps you could introduce the next witness.

Senator SPECTER [presiding]. Fine. Thank you very much, Senator Hatch.

Senator HATCH. We will keep the record open to submit written questions to you, and I will try and submit the rest of my questions in writing. I appreciate the candor with which you have answered the questions that I have given, and I want to thank Senator Specter for his kindness in allowing me to question.

Mr. HABICHT. Thank you, Senator.

Senator SPECTER. Mr. Habicht, I listened to your responses to Senator Hatch on the issue of interpleader and I do not understand your position.

The current proposed legislation, which I understand EPA is backing, would eliminate the right to bring in additional defendants, is that correct?

Mr. HABICHT. S. 51 has been read to have that effect, so we are proposing a provision——

Senator SPECTER. Well, wait a minute. Is it not flatly a prohibition about bringing in additional defendants?

Mr. HABICHT. S. 51 does prevent by its terms, apparently, the bringing in of additional defendants until after judgment. The revised provision which I——

Senator SPECTER. My question to you is, does your current proposal prevent bringing in additional defendants, and your answer to that is yes?

Mr. HABICHT. But it is the current proposal—I am sorry; I do not mean to be difficult. It is the current proposal in S. 51, but it is not the Department of Justice or EPA's current recommendation.

Senator SPECTER. OK. All I want to know is what is pending at the present time. What is pending at the present time is to prohibit bringing in additional defendants until after a judgment or settlement.

Mr. HABICHT. That is correct.

Senator SPECTER. Now, you are saying that you now have a new position which is different from the current proposal?

Mr. HABICHT. That is correct.

Senator SPECTER. All right. Now, in response to one of Senator Hatch's questions, you said it has not cleared all the administrative levels in the Federal Government, is that correct?

Mr. HABICHT. That is correct.

Senator SPECTER. So we do not know whether that new recommendation is going to be accepted by all your superiors in EPA or the Department of Justice and the White House.

Mr. HABICHT. That is correct. It has gone fairly far in the process and I would be willing to go out on something of a limb, but you are correct. It has not absolutely——

Senator SPECTER. Well, all I want to understand is where you are.

Mr. HABICHT. Thank you. Yes, sir.

Senator SPECTER. You think it will be approved, but it has not been approved by everyone yet?

Mr. HABICHT. That is correct.

Senator SPECTER. And the proposal which you expect to be approved would allow a defendant to bring in additional defendants as he chooses, consistent with the current Federal rules of civil procedure?

Mr. HABICHT. That is correct, subject——

Senator SPECTER. All right, because you had made a statement about somebody might not be liable; that they might try to bring in a lot of people who were very remote. And Senator Hatch, I thought, properly said, well, you do not know that until you try the case.

But what you are saying is that the new proposal is not going to have any limits as to the right of the defendant to exercise his judgment on legal procedures to bring in anybody against whom he chooses to make an allegation, as defendants may now under the Federal rules of civil procedure in joining third parties defendant?

Mr. HABICHT. That is correct. In the interests of complete clarity, our proposal would permit defendants to bring in any third party of their choosing, to name them in the case and to file third-party complaints against them immediately upon the initiation of the Government's lawsuit.

The sequence of actual hearing of issues in the case would be prescribed by the statute.

Senator SPECTER. Let me come to that. I think your answer is a simple yes. A defendant can bring in anybody he chooses, as he may under the current Federal rules of civil procedure?

Mr. HABICHT. Yes.

Senator SPECTER. Now, a question about evidence. You said that there are going to be some evidenciary modifications. Do you propose in the statute to make some changes in the current rules of evidence or the discretion which is accorded to trial judges to hear cases and arrange for the presentation of evidence as the judge sees fit?

Mr. HABICHT. We would not change the rules of evidence, but we would propose that the sequence of issues to be heard be prescribed in a limited way by statute.

Senator SPECTER. You are going to make a legislative change on the sequence of issues to bind a Federal judge in how he is going to try one of these complex cases?

Mr. HABICHT. That is correct. The case in chief——

Senator SPECTER. Do you have any language which you have prepared on that?

Mr. HABICHT. Yes, we do.

Senator SPECTER. May I see it?

Mr. HABICHT. It is attached to my testimony, if you have that. Do you have a copy of it?

Senator SPECTER. I will confess to not having read your testimony.

Mr. HABICHT. You have quite a few things to do. Let me give you my copy.

Senator SPECTER. Now, are the changes in judicial procedures a part of the present bill?

Mr. HABICHT. Yes, they are.

Senator SPECTER. On the question of judicial review, Mr. Lucero, you addressed that, and I quite agree with the great difficulty of striking an appropriate balance as to having a cleanup proceed.

When you say that if EPA has made the wrong judgment as to what the remedy should be, then it is EPA's expense, what has your experience been in litigation, if any, with regard to parties who challenge the cleanup orders? What has happened?

Mr. LUCERO. Sir, what has happened——

Senator SPECTER. Have you lost some cases? Have the courts said that you have entered the wrong remedy?

Mr. LUCERO. Well, what I need to explain is that much of the program is not yet at the cost recovery stage, so we do not have a great deal of experience in this particular——

Senator SPECTER. Do you have any?

Mr. LUCERO. We have not got much experience in the cost recovery area.

Senator SPECTER. Do you have any?

Mr. LUCERO. We have some removal actions where they are still underway, and I would have to say, no, we do not have any experience right now.

Senator SPECTER. You have no experience where somebody has challenged the remedy which you have put into effect?

Mr. LUCERO. Not in a cost recovery case. We have had companies attempt to challenge us at the selection of remedy stage, where they actually have attempted to bring a lawsuit seeking injunctions to stop the cleanup or to stop the Agency from taking any further action until the remedy selection can be reviewed.

Our position in those cases has been as it is in the provision in front of you.

Senator SPECTER. Courts have upheld you on that?

Mr. LUCERO. They have upheld us that there is no right——

Senator SPECTER. It cannot be reviewed at that stage?

Mr. LUCERO. That is right, and there are several cases; we could give you the names and the citations if you would be interested.

Senator SPECTER. Well, I would be interested to see those.

Is there any possibility of fashioning some opportunity for some intermediate review, such as is present under the Interlocutory Appeals Act, where there has to be some very substantial showing? A degree of review which would not permit delay or a cessation of the remedy unless some very strong burden were met, but at least would afford some sort of a judicial oversight at that stage? Do you think that would be impossible to structure?

Mr. HABICHT. The only thoughts I would offer on that, Senator, would be that I would not rule it out as being impossible. The most important thing is not to encourage a lot of lawsuits because people will have all sorts of incentives to bring lawsuits to get EPA to do the remedy a different way.

Senator SPECTER. Well, I agree with you about that, and I do not know what the answer is. I think that there is a very high value in proceeding with a cleanup and not having that delay. It does not strike me as being a totally acceptable answer to say, well, if EPA is wrong, then EPA is going to have to pay for it, because that is the Treasury; that is the taxpayers paying for it.

There are varying standards of proof which you have to meet at various stages of legal proceedings. If you want to get a temporary restraining order, you have to show a lot more than if you want to get a verdict after a full trial. If you want to proceed under some interlocutory appeals act, you have to meet tougher standards—proof beyond a reasonable doubt or clear and convincing evidence.

There is quite a concern about not having any review at all, and that is why I broached the question as to whether we might structure some standard which would be a very high hurdle for someone to achieve, so that there could be no stay of proceedings unless a judge takes a look at it and feels that a very high burden has been met.

Perhaps there could be some sort of expedited proceeding to hear evidence, giving a court the power to review it within a very brief period of time, as a temporary restraining order can now be in effect for 5 days on an ex parte proceeding—just thinking about something that might be done to give some opportunity, but would not counter the important policy of not having protracted delays.

Mr. LUCERO. Something to just help you in thinking about this—and it is a tough issue—is that from the time the remedy is selected until the start-up of the design stage, which is the next part of the cleanup activity, there is usually a time period between 30 to 60 days, and so that is a fairly short time frame that we try to stay on.

That is because there is such tremendous pressure from the community that is affected to make sure the cleanup proceeds rapidly. And while we can go back and try to think about how we could come up with something there, the problem is that we have already seen, even in injunction hearings which theoretically should be able to move to the front of the court schedule and get an expedited hearing, that sometimes, because of the complexity of the issues and the briefing of the legal questions, it requires several months to get to the injunction hearing.

So it is very difficult to see how we could fashion—I mean, we will go back and try to do it, because I can understand your concerns, but it is hard to see how you can build that in and still stay on the same schedule that the public is concerned about around the sites.

Senator SPECTER. Well, I would like you to take a look at it. I know it is not easy and I am not sure it can be done, but I think it is worthy of our consideration. And you have been in the trenches, so you really have the best insights.

Let me take up two other points just briefly before yielding to Senator McConnell. On the business about suits, compelling the administrator to proceed on nondiscretionary duties, I can understand, Mr. Thomas, that you feel somewhat harassed about that.

It is very hard to have a definition as to what is a nondiscretionary duty as opposed to a discretionary duty. Do you lose many of those cases?

Mr. **Thomas**. We do. We have a number of cases where we have court decrees that put us on different schedules than we were on.

Senator **Specter**. If you have that kind of litigation where you are defending that kind of proceeding, it is practically tantamount to having a decision on the merits, is it not?

What they are essentially saying is you failed to do something that you have a mandatory obligation to do, and then you have to get into the merits of the case. I am wondering how different that is from a private right of action which would seek to have an adjudication on the merits, whether you save a lot of time.

Mr. **Habicht**. Well, in practice, Senator, it very often works out the way you have described it. In other regulatory contexts where citizens are bringing suits, presumably just to enforce a deadline or something like that, which is a nondiscretionary duty, the suits very often stray into trial on the merits. Even though the courts of appeals are vested with jurisdiction over the substance of regulations, district courts often are able through characterization of duties in different ways to get into a whole array of issues, and that is a very significant concern, describing what is a rule, regulation, standard, or nondiscretionary duty.

Senator **Specter**. When these suits are brought to try to compel your performance of a nondiscretionary duty, are the companies present? They are not It is citizen versus administrator, right?

Mr. **Lucero**. In some cases, sir, the companies can be involved. This has always been a problem with the citizen suit provisions—a citizen includes a corporation, and it can be a responsible party. So a responsible party can use the citizen suit provisions in some cases to bring challenges to something the Government did or did not do.

Senator **Specter**. So the citizen has the option of bringing in the company at the time that the administrator is sued?

Mr. **Lucero**. The company may bring the suit as a citizen itself. But, yes, the citizen could also bring an action and, if necessary, could seek to join the responsible parties.

Senator **Specter**. One final point. There has been some concern about the absence of any reporting requirements and some suggestion that this legislation might require a report from the Administrator or the Department of Justice on an annual basis to specify the criteria used to determine parties included in a suit and criteria used to determine actions which are brought.

We in the Congress impose a lot of reporting requirements on the President. We are arguing now today about the Department of State authorization bill, and you have caught a tough day with a lot of votes and motions for reconsideration. That is why there is a parade here; members have been on the floor most of the morning. That is illustrative of the kinds of reporting requirements which are made.

Would you have any concern about that kind of a requirement, except as it would take up some of your time?

Mr. **Thomas.** I think that would be the basic concern, Senator. What we try to do is work with you and make available to you that information. For instance, the criteria you were talking about are incorporated into our draft Superfund enforcement policy and settlement policy which we made available to you and which we have had hearings on.

We have discussions with your staff. We put it in the Federal Register for comment. It is just the amount of time required and one more report, but we certainly do not have any problem making that information available, and do that voluntarily; we try to on a continuing basis.

Senator **Specter.** Thank you very much.

Senator **McConnell.** I do not have any questions.

Senator **Specter.** Thank you very much, gentlemen. We very much appreciate your being here.

Mr. **Habicht.** Thank you, Senator.

[The following material was subsequently supplied for the record:]

U.S. Department of Justice
Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 13, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I appreciated the opportunity to appear before the Senate Judiciary Committee on June 7, 1985, to answer some of your questions on the portions of the Administration's CERCLA reauthorization proposal that were incorporated into S. 51, the Superfund Improvement Act of 1985. As I indicated at that time, the issues raised are difficult ones, but we are convinced of the need for an enforcement scheme sufficiently effective to ensure a significant amount of private party clean-up. We are also committed to minimizing unnecessary litigation and ensuring that the liability provisions are applied rationally and in a way that encourages fair settlements. Having spent a great deal of time seeking to build on our experience of the last several years, we are most interested in your and the Committee's views on these matters.

During the hearing, you asked why the International Business Machines Corporation (IBM) was named as a defendant in the Conservation Chemical Company litigation in Kansas City, Missouri. This letter responds in additional detail to that question.

The government's preliminary investigation of the Conservation Chemical Company ("CCC") site indicated that the groundwater in the vicinity of the CCC site was severely contaminated by discharges from several discrete types of industrial wastes. Each of these types of wastes poses a different risk to the public due to differences in mobility, degradation properties, and toxicity. Accordingly, in addition to the site operator, the government also named as defendants those companies believed to have been the major contributors of each of those types of wastes. These included (1) ARMCO, the largest contributor of metal finishing wastes, believed to be responsible for much of the toxic metals found in the groundwater, (2) FMC, the principal contributor of arsenic compounds, believed to be responsible for the high levels of arsenic at and downgradient of the site, and (3) Western Electric (now AT&T-TI) and IBM, believed to be the principal contributors of waste solvents, including trichloroethylene ("TCE").

On the basis of invoices, shipping records, bills of lading and cancelled checks, depositions of past and present employees of CCC, and answers by IBM to written discovery, EPA has conclusive evidence of shipments by International Business Machines of nearly half a million gallons of waste to the Conservation Chemical Company facility in Kansas City. IBM itself has admitted shipping in excess of 420,000 gallons of waste materials to the CCC-Kansas City site.

IBM appears to be a "small" generator only because ARMCO sent an overwhelming volume of materials to the site. Moreover, a direct comparison between the 25 million gallons of "pickle liquor" sent to the site by ARMCO and the hundreds of thousands of gallons of solvents sent by IBM is misleading. ARMCO's sulfuric acid "pickle liquor" is a solution that contained only a small percentage of the toxic metals that are of concern, while the entire amount of IBM's trichloroethylene, for example, is highly toxic and is carcinogenic to laboratory animals even in minute amounts.

As is demonstrated by IBM's own answers to discovery in this litigation, four IBM facilities shipped considerable volumes and a diverse mix of solvents and other chemicals which are uniquely related to the endangerment posed by this site. Included in the IBM waste streams shipped to CCC-KC from four different IBM industrial manufacturing facilities (Rochester, Minn.; Boulder, Colo.; Austin, Tex.; and Lexington, Ky.) are the following hazardous substances:

Solvent Waste (TCE): In excess of 47,000 gallons
Methyl ethyl ketone : In excess of 98,000 gallons
Cyanide Waste : 20,660 gallons plus 48,000 pounds
Acid Waste : 20,000 gallons plus 9 carboys
Ferric Chloride : 9,000 gallons
Miscellaneous Wastes : Between 137,000 and 205,000 gallons
Other substances in lesser quantities.

Most significantly, the above stated waste figures are minimum estimates of the waste volumes contributed by IBM to CCC. First, these numbers do not include volumes of TCE wastes shipped to the Kansas City Site by IBM's Lexington, Kentucky, facility through the CCC Gary, Indiana operation. This so-called "transshipment" of IBM's TCE waste is documented in IBM's own correspondence with CCC. Second, the volume estimates may also be low because the records of the CCC site operations for 1960-1970 were destroyed by a fire on the CCC site in 1970. In short, these IBM volume contributions to CCC are probably understated.

These chemicals are present in extraordinarily high concentrations on the site, as well as in the groundwater underneath and emanating from the site. The TCE concentrations are of particular concern. While TCE is itself a hazardous substance, it also has been transformed at the site into an even more toxic compound, vinyl chloride, a proven human carcinogen. If the CCC site were left as is, experts retained by the United States have testified that TCE and vinyl chloride from the site could contaminate the drinking water supplies in Liberty and Independence, Missouri. IBM and fellow defendant Western Electric were the leading contributors of TCE to the site. In short, the IBM wastes shipped to the CCC site pose a major threat to human health, welfare and the environment and contribute significantly to the need for a major groundwater remedy at the site. Importantly, while we encounter differing technical fact situations at each site, we will consistently seek to enforce when we have a substantial group of responsible parties and will devote special efforts to ensure that we have identified such a group.

Charts of the wastes and hazardous constituents sent to the CCC-KC site by each of the four IBM facilities are attached. It should be noted that this is information compiled from IBM's own answers to the written discovery requests of the United States and the Court.

I hope that this material is useful to you. We would be glad to respond to any further questions. As I have indicated in the past, we have been open to all points of view on these difficult issues and are particularly interested in your thoughts on how the enforcement program can operate most effectively and fairly.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division

Attachments

HAZARDOUS SUBSTANCES SHIPPED BY IBM TO CONSERVATION CHEMICAL COMPANY-KANSAS CITY

Hazardous Substances	Boulder	Rochester	Lexington	Austin
TCE	X			
Methylene Chloride	X	X		
o-Chlorophenol	X			
Chromic Acid		X	X	X
Copper Sulfate	X			
Potassium Cyanide	X			X
Toluene	X	X		
Nickel Sulfate Plating/ Solution	X			
Benzene		X		
Copper Cyanide	X			
1-1-1-Trichloroethane	X			
Freon, 1-1-3	X			
Chromium			X	X
Zinc		X	X	X
Cadmium				X
Chloroform	X	X		
Dichlorodifuoro-methane	X			
1-1-2-2- Tetrachloroethane	X			

demonstrable outcome of the litigative regime so far is the enrichment of lawyers, especially high-priced Washington, D.C. lawyers. Litigation has not produced the expeditious cleanup Congress sought in this legislation. We ought at least to try the approach many of us thought had been started in 1980 -- where the Superfund finances cleanup, not lawsuits. One way to start would be to prohibit any use of Superfund moneys for litigation and make litigation expenses be borne solely out of both EPA's and Justice's normal appropriations.

Senator SPECTER. Let me call the witness, who is Mr. George Clemon Freeman, Jr., Esq., of Richmond, VA. I am pleased to preside at least long enough to call Mr. Freeman. Senator Thurmond had noted in his prepared comments Mr. Freeman's prior assistance when the comprehensive amendments were put into effect on the Administrative Procedures Act and the comprehensive criminal code reform legislation.

Senator Thurmond wanted Mr. Freeman to be thanked for his participation and expert, independent and thoughtful perspective on the Superfund legislation. And I would like to supplement that introduction by commenting that I have known Mr. Freeman since law school days, where he was an outstanding student at the Yale Law School.

I have followed his career over the years and had a chance to discuss with him in a brief way his own views on this subject yesterday, so that I am very pleased to welcome my friend and colleague of long standing to this proceeding today.

Mr. Freeman, if you would introduce your associates, we would appreciate it.

STATEMENT OF GEORGE CLEMON FREEMAN, JR., HUNTON & WILLIAMS, RICHMOND, VA, ACCOMPANIED BY MARK WEISSHAAR AND ALFRED LIGHT

Mr. FREEMAN. Yes. I have with me Fred Light and Mr. Mark Weisshaar, who are both from my firm and both have helped me in preparing this testimony and have been, in general, assisting me over the years in Superfund efforts.

I welcome the opportunity to be here today. I would also like to say at the outset that in my prepared testimony and in my testimony here today, I have taken and will take a fairly harsh view of EPA and the Justice Department enforcement policy under Superfund. But I do not intend any of those comments to reflect personally on Mr. Thomas, Mr. Habicht, or anybody else. I think Mr. Thomas is a very able EPA Administrator. I think we are glad to have him there, and so is Mr. Habicht. I think they are bound, however, by the policies and precedents of their predecessors. The basic shape of Superfund has been set in the past and they are simply carrying out that policy under those precedents.

When Superfund was enacted in 1980, many of us thought in its implementation it would follow the pattern of the highly successful Clean Water Act. Most of the wastes that had been disposed of in the past at the really critical sites would be cleaned up expeditiously by EPA through use of the Superfund; indeed, that is why this act is called the Superfund Act.

Following the pattern under the Clean Water Act of Federal assistance to municipalities in the cleaning up of municipal sewage, Federal funds would be provided here for cleanup. The funds would come, not, however, from the general revenues, but by a special tax paid mostly by the oil and chemical industries.

Now, those industries on Monday will tell you that they believe that tax is unfair and that a broader-based tax would be fairer. And indeed the Finance Committee has recently considered the subject and agrees with them and recommends a higher level of funding and a broader tax. I personally think that is a satisfactory solution to that problem.

In any event, we thought that EPA would move expeditiously with actual cleanup. But instead of cleaning up at the sites, EPA's main efforts to date have been to bring a series of very complex and complicated lawsuits.

I need not remind this committee that normally litigation is the last resort in any endeavor. It is notoriously slow; it is costly for the people involved in it. It imposes a great burden on our Federal courts, which, as this committee knows, are already bogged down in giving priority to criminal trials. And finally sometimes litigation is often unfair.

Litigation has a proper role in the Superfund Program, but it should deal primarily with post-enactment conduct, and even there litigation should be the exception rather than the rule. Superfund's liability provisions, which, after all, are not in the act, but incorporated by a reference to section 311 of the Clean Water Act, should be enforced like section 311, prospectively only.

Thus, the part the liability provision should play is to shape future conduct to avoid strict liability. That should be the main role of litigation under Superfund.

Now, as Superfund has been administered, however, it has become a litigation nightmare. Supersuit rather than Superfund is a better name for the program. The first round in this litigation nightmare starts when EPA brings its enforcement action.

Now, in the panel before you earlier, Mr. Thomas and Mr. Habicht, the discussion has proceeded as if EPA and the Justice Department had complete control of the Superfund Program. We heard Mr. Thomas promise again and again that he will use the broad discretionary powers of enforcement that he has under this act benignly. But he did not mention the fact that not only is he given the power to bring these Superfund suits, but every State in the Union is given that power, and unfortunately EPA has interpreted the act so as to give private citizens, under certain circumstances, a right of action under Superfund.

And on top of that, S. 51 would impose a citizen suit requirement. So there cannot be any overall control of the Superfund Program. There cannot be any overall shaping of its administration to make it fair and benign because prosecutorial discretion is not concentrated exclusively in EPA.

Once EPA or a State sues you, though, that is just the beginning. Later on, we have these suits for contribution that the earlier panel discussed at great length. Later on, there may be a third round of suits between persons caught in the first and second round of suits and their insurers as to whether or not the insurance company policies cover this. Then there is a fourth round, usually, and that is the place where people usually come in and file suits for personal injury, seeking to piggyback on the massive resources of the Justice Department or the State. And then finally, there are tremendous disclosure problems which may give rise to litigation yet further down the road.

Now, earlier today Senator Simpson asked why was it that insurance might not be available in the future. I think we should think of that question not only as why is insurance not going to be available in the future—and I urge you to ask the insurance industry witnesses who will be here on Monday that question—but we should also ask why new investments will not be forthcoming in the future.

I think they are both part and parcel of the same problem. They both stem from the fact that in EPA's enforcement of this act, it has enforced strict, joint, and several liability retroactively in the face of the common law, traditional standards of statutory construction, and, for the reasons set forth in the appendix to my brief, I believe in the face of the Constitution.

Back in 1980, Senators Domenici, Bentsen, and Baker, in their separate statement to the then pending Senate bill—a bill which the Senate rightly rejected—condemned the Justice Department for recommending a policy of "punishing the innocent for the sins of the guilty." But that precisely is the policy which EPA and Justice is pursuing in administration of this act. By that, I mean EPA has made no attempt here to distinguish between persons whose pre-enactment conduct was illegal or actionable—the guilty—the legally responsible—on the one hand—and persons whose conduct did not violate any law or subject them to liability under any applicable standard of the day—the innocent—or the others.

Now, as we saw earlier today on the chart that unfortunately has been removed, EPA expects to exact billions from the private sector over the last 5 years, I will tell you where it is all coming from. It is coming not only from the people who did wrong in the past, it is also coming from the people who did right in the past. And some of it is also coming from the insurance industry for premiums which they did not charge for or consider at the time that they entered into those insurance policies.

So the money is coming from the innocent as well as the guilty. And what is the signal given to the investment community in this country and abroad? It is that doing business in the United States has now become unpredictable and unfair. Indeed, the effects of retroactive application of strict, joint, and several liability, particularly because it can be so disproportionate to the conduct involved in the past, makes doing business in America as risky as in some third-rate banana republic.

So it is not surprising that many investors are no longer willing to invest in this country in enterprises where waste products must be generated and insurance——

Senator McConnell [presiding]. Mr. Freeman, excuse me for interrupting you. We need to wrap up your summary here.

Mr. Freeman [continuing]. Is no longer available.

I would simply like to speed up by saying, first of all, that you have four sections before you. As to section 126, the contribution section, I have the following recommendations to you. Delete EPA's contribution deferral provision because it is inconsistent with the Federal Rules of Civil Procedure, as Senator Specter brought out. Provide express criteria for apportionment of liability among responsible parties under the statute. Limit liability for the defendant's fair share where there is a reasonable basis for apportionment. Mandate that Superfund pay for the bankrupt, absent or immune party's share of liability.

As to judicial review, retain the provision in section 132 to eliminate the exclusive jurisdiction of the court of appeals. Require, however, that S. 1080's anti-evasion provision be added to require EPA to proceed via rulemaking for major policies and de facto rules. Expressly, explicitly, identify three things as giving rise to immediate judicial review. Those would include waivers of monetary and time limits on removal, the issuance of administrative orders, and the selection of remedial action. Prevent EPA from the stacking the deck against the citizen in court through adoption of the Bumpers amendment that was included in S. 1080.

As to pre-enforcement review, delete EPA's proposed exemption and require minimal protections for the building of a record along the lines set forth now in the Administrative Procedure Act as it would have been amended by S. 1080.

Finally, as to citizen suits, I ask you to consider the strong constitutional question presented by citizen suits. Under the Constitution, as interpreted in Buckley versus Valeo, the power of the President to enforce the law under the Constitution is exclusive and Congress cannot take that power and delegate it to unelected, politically unaccountable private citizens.

Finally, if you do include a citizen's provision, at least provide that where the Government is given a right to intervene and it does not choose to use it, the Government is to be bound by the decree of the court or any settlement. Otherwise, we have, in effect, double jeopardy.

Thank you very much.

[The prepared statement follows:]

SUMMARY

EPA's interpretation and administration of the Superfund Act present major problems of fairness and constitutionality. The Act was designed to operate largely through fund financed cleanup in the basic pattern of the Clean Water Act. But EPA has instead made it a coercive, litigation driven regime. EPA has applied strict, joint and several liability retroactively, contrary to common law and the longstanding expectations of the market place. Many persons whose conduct was neither illegal nor actionable are threatened with liability so grossly disproportionate to the past conduct as to be punitive. This retroactive liability also menaces the insurance industry, which faces the prospect of paying a substantial part of the litigation costs and part of the ultimate cleanup awards. The current system discourages further investment or insurance in this country because of its resulting unfairness and unpredictability.

S.51, as reported by the Senate Committee on Environment and Public Works, failed to address these hard core, fairness problems. S.51 presupposes maintenance of the current litigation driven regime and proposes a series of procedural changes that could make the system even more unfair. In response to EPA pleadings for even broader prosecutorial discretion, these changes would eviscerate the protections afforded by the Administrative Procedure Act in ways fundamentally opposite to the thrust of this Committee's landmark efforts at regulatory reform in S.1080 in the 97th Congress. These proposals in S.51 would:

- Bar judicial review of unilateral EPA administrative orders and cleanup decisions for an indefinite period of time until it is convenient for EPA and the Justice Department (Section 133).
- Narrowly constrain judicial review to the administrative record even though there are no adequate, formal procedures governing the administrative decision (Section 133).
- Overrule Federal Rule of Civil Procedure 14(a) for Superfund cases by prohibiting the trial of contribution claims among defendants until judgment is rendered in EPA's case and thereby force the courts to try two cases involving many of the same facts (Section 126).
- Create a new cause of action by which citizens may interfere with EPA's cleanup priorities (Section 138).

All of these proposals should be rejected. This Committee should instead offer amendments that would:

- Amend the Administrative Procedure Act to institute the major reforms intended in S.1080, including especially those dealing with:
  * notice
  * agency record for review
  * procedural rights in rulemaking and adjudications
  * judicial review, and
  * the so called "anti-evasion" problem, by limiting informal agency guidance to situations that do not affect substantive rights;
- Require EPA to follow the amended APA in administering Superfund; and
- Require the courts to follow the APA standard, as revised by Bumpers Amendment, in appeals from EPA rules and EPA orders.

Beyond that, the Committee might also wish to express its views on closely related issues. Other S.51 provisions would:

- Circumvent the limitations on both removal and remedial actions by creating a huge loophole which is not subject to meaningful judicial review (Section 108).

- Create an open-ended statute of limitations subject wholly to EPA's control and potential manipulation (Section 131).
- Impose a floating federal lien on property for any costs incurred by EPA (Section 127).
- Facilitate a direct attack on the time honored concept of limited stockholder liability, by eliminating the usual standard applied under Federal Rule of Civil Procedure 4 and by providing instead for nationwide service of process (Section 134).

Finally, your views on the unfairness and unconstitutionality of the current retroactive application of strict, joint and several liability would support the adoption of floor amendments to S.51 that would:

- preclude its retroactive application;
- mandate apportionment for joint and several liability; and
- otherwise expedite voluntary compliance with the Act.

Tinkering with the present system will only make it worse. Basic reforms along these lines are needed to restore fairness to the system, make insurance once more available, and to speed up cleanup.

STATEMENT OF GEORGE CLEMON FREEMAN, JR.

HUNTON & WILLIAMS
RICHMOND, VIRGINIA
WASHINGTON, D.C.

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING
S.51 -- SUPERFUND IMPROVEMENTS ACT OF 1985

June 7, 1985

Mr. Chairman, Committee Members, Ladies and Gentlemen -- my name is George Freeman. I am a partner in the law firm of Hunton & Williams, with my offices both in Richmond, Virginia, and Washington, D.C. I am also a member of the Virginia, D.C. and Alabama bars.1/

1/ I am also a member of the Council of the American Law Institute (ALI) and the American Bar Association (ABA). In the past, I have served as Chairman of the ABA Standing Committee on the Facilities of the Law Library of Congress, on the Council of the ABA Section of Corporation, Banking and Business

(footnote continued)

It might be helpful to indicate briefly where I am coming from on the issues before you today in terms of past and present practice and bar related activities. My firm represents clients that have an interest in the present administration of the Superfund Act and who would be adversely affected by S.51. We are also advising the American Insurance Association in the Superfund reauthorization process on aspects of the Superfund liability regime as they affect that industry and others. However, in my testimony here today, I am not speaking for my firm or any of its clients. I express my own views as a member of the practicing bar.[2]

(footnote continued)

Law, and as Chairman of that Section's Ad Hoc Committee on the Federal Criminal Code. I am presently a member of that Section's Ad Hoc Committee on Tort Law Reform and its representative on the ABA's Coordinating Group on Regulatory Reform.

[2] As I wrote Senator Thurmond on June 3rd in accepting his invitation to testify before you, while I am apparently the "industry witness" on this panel, apart from a consensus as the overall unfairness of how the present act is being administered, there is no consensus among all segments of the business community on all of the complex issues raised by Superfund and S.51. The views I express will be my own, based on my experiences in my almost thirty years of practice representing clients in various segments of the business community and in my pro bono work. Thus, it should be clearly understood that I am not here as a spokesman for the American Insurance Association (AIA), the Chemical Manufacturers Association (CMA), the American Petroleum Institute (API) or any other trade association or business. AIA has special concerns about its current insurance coverage/insurability crisis, and CMA's and API's members are presently the two special taxpayers under the Superfund regime. I accordingly urge that after the hearing on June 7, the Committee afford all three industries the opportunity to present their views to you in light of their separate concerns.

My interest in the Superfund Act stems initially from my informal work, pro bono in 1980, with several members of the Environment and Public Works Committee and their staffs in analyzing various proposals in S.1480, a Senate superfund bill which did not pass, and my subsequent service as one of 12 members of the Superfund § 301(e) Study Group created by the Act which did pass. I was one of the three lawyers on the Group appointed by the then President of the American Bar Association.

Just as pertinent is my longer standing interest in broader improvement of the administrative process, which stems from my practice over the past decade and a half. That practice has been predominately before the Environmental Protection Agency, Nuclear Regulatory Commission (and its predecessor the Atomic Energy Commission) and the various energy regulatory agencies presently congregated in the Department of Energy. It has involved participation in rulemakings, individual licensing and permitting actions, and related judicial appeals and litigation. In the middle 1970s, our firm represented electric utility industry participants in four of the five major rulemakings which the Nuclear Regulatory Commission conducted. Our firm has also been counsel, and I have acted as lead counsel, for the electric utility industry in all of the major rulemakings at EPA affecting that industry under the Federal Water Pollution Control Act since its passage in 1972 and all of the EPA rulemakings under the Clean Air Act affecting that industry since the passage of the 1977 Amendments to that Act. Our firm has, in addition, acted as counsel for the electric utility, coal and other industries in a number of appellate cases that have resulted in decisions of the Supreme Court and of the Courts of Appeals.

Thus, for about a decade and a half my firm and I have been dealing with rulemakings and other agency proceedings directly posing the unavoidable tradeoffs that are a part of national energy and environmental policy and have been testing these agency rules and orders and the procedures by which they are implemented before the appellate courts. It is this broader practical experience that has brought me before this Committee in the past to testify on regulatory reform proposals, such as S.1080 sponsored by Senators Laxalt, Grassley and Heflin; bills to amend the venue provisions and to improve the process for judicial review of rulemakings, such as S.2419, sponsored by Senators Simpson and DeConcini; and the many versions of the Federal Criminal Code over which this Committee has labored for so long under Senator Thurmond's leadership.

From this experience, I come before you today with this overall policy perspective on the matters now before you: in the long run, for any law to be observed and enforced, we must be able to count on voluntary compliance by the vast majority of persons subject to it. To get that voluntary compliance from our citizens, first we have to have a law that is clear on its face and that people can understand. Second, we have to have a law that the majority of the people think is fair. And, third, we have to have stringent enforcement against the small minority who disregard it. Then the law actually works.

But the law before us today, the Superfund Act, is probably the most obscure piece of legal drafting any of us has ever experienced. Since most of you were here in 1980 and some of you participated in the Senate compromise, I need not tell you why the final bill is obscure and conflicting. You know far better than I.

I was glad to hear that this Committee asked for and received a sequential referral of S.51, the "Superfund Improvement Act of 1985," which the Committee on Environment and Public Works reported in March. The present Superfund Act, the product of that frail last minute compromise during the 1980 lame duck session, probably merits "improvement" more than most legislation.

Unfortunately, S.51, as reported from the Environment and Public Works Committee, fails to come to grips with the fundamental flaw in the current Act as EPA is interpreting and administering it. That is, its coercive litigation regime, which seeks to impose retroactively a new substantive federal standard of strict, joint and several liability, without any proof of causation, on anyone remotely connected with a waste site. Disregarding the warning sounded in 1980 by Senators Domenici, Bentsen and Baker in their separate staement on S.1480 -- a bill that the Senate rightly rejected -- EPA and the Justice Department have indeed pursued a policy of "punishing the innocent for the sins of the guilty." By this I mean that EPA in its retroactive application of strict, joint and several liability has made no attempt to distinguish between those persons whose preenactment conduct was illegal or actionable under the applicable state or federal law at the time it occurred and those whose conduct did not subject them to punishment or liability under the applicable standards of the day.

This retroactive application of a new substantive standard is contrary to long-standing traditions of common law and statutory construction and, because of its punitive joint and several aspects, may also be unconstitutional. Also this retroactive application of new, unexpected, potentially disproportionate and devastating liability on those whose conduct was not illegal or actionable has lead investors and insurers to lose faith in the fundamental fairness and predictabiilty of our system. Thus, as presently administered by EPA, Superfund poses not only a threat to the past guarantors selected by EPA or the states to clean up or pay up, but for the future of our economy. How can we expect investors to continue to invest, or insurers to continue to insure, under such an unfair and unpredictable regime?

Implicitly recognizing the inherent unfairness of this retroactivity, the new EPA Administrator has recently come forward with promises of more selective, benign enforcement. But that is not enough. No one wants to live under the law of prosecutorial discretion. Statutory reform is the only way to provide the assurance of fair treatment essential to restoration of faith in our system and voluntary compliance with this law by the people fairly subject to it.

S.51 in its present form makes no effort to come to grips with this fundamental fairness/enforceability problem. The fact of the matter is that by the changes made in the sections of the Act you have noted for special scrutiny, S.51 would make the Act even more unfair, indeed draconian. Moreover, the changes proposed in the judicial review standards and administrative procedures are fundamentally at odds with those so carefully wrought by this Committee in S.1080 in the 97th Congress. It is difficult to understand how virtually the same Senate which passed S.1080 94-0 under this Committee's leadership could be considering this bill.3/

Because this Committee has agreed to limit Committee sponsored amendments to four specific sections, in my testimony I will first set forth the basic framework of the present Act, then turn to how these four proposed provisions in S.51, and

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3/ 128 Cong. Rec. S.2713 (daily ed. Mar. 24, 1982).

related provisions, fit into the present regime, if left fundamentally intact. I will offer suggestions on reasonable alternatives you may offer -- alternatives that are in the spirit of the fundamental approach to the reforms of the administrative procedures and judicial review which you proposed in your landmark S.1080. At the end of my testimony, I will come back to the fundamental question of the present unfairness and inefficiency of EPA's current enforcement policies and will discuss basic changes regarding "retroactivity" and "joint and several liability" that should be made in the Act when it come to the floor.

If left unchanged or merely tinkered with, the Superfund Act will continue down the road to stalemated cleanup and litigation nightmare. Therefore in your Committee deliberations, I urge you not to simply react to the obvious abuses you will discover in the S.51 provisions proposals but to consider what measures are actually needed to improve Superfund. In specific areas where you may offer Committee amendments, I urge you to reject section 133 of the current bill and to substitute instead the judicial review and administrative procedural reforms carefully crafted in S.1080 in the form of amendments to relevant provisions of the Administrative Procedure Act and to make EPA administration of Superfund, like that of all other agencies with their organic acts, adhere to these fundamental principles. When the bill ultimately comes to the floor, each of you individually may wish to join with others in amendments that at a minimum would preclude retroactive application of new federal liability and substitute mandatory apportionment for joint and several liability. Thus, in Committee and on the floor, you may be able to bring the Act back to the way I believe most of you in Congress in 1980 intended -- where the Superfund mainly finances cleanup, not a runaway litigation chain reaction.

I will first give a general summary of the typical administrative and litigation process involved in EPA initiated Superfund cleanups, then discuss the sections of S.51 which directly affect matters within the jurisdiction of the Judiciary Committee and, finally, look at the major problems posed by retroactive application of strict, joint and several liability. To illustrate my general statements, I have also provided you with an appendix with actual, concrete "horror stories."

I. A Primer on CERCLA

Enacted on December 11, 1980, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund" or "Superfund") is a liability-creating statute which seeks to achieve the cleanup of abandoned hazardous waste sites.

Superfund was designed to clean up the abandoned hazardous waste sites around the nation by providing cost-effective measures to protect public health, welfare, and the environment. Some or all of these cleanup costs may be borne by present owners or operators,4/ past owners or operators, generators, or transporters as a result of unilateral EPA orders or government-sponsored litigation. Most of the important decisions in the cleanup process are made administratively by EPA or the State.5/ The decisions are often based on internal and shifting policy guidance rather than on duly-promulgated rules.6/ But these administrative decisions are significant because private parties will ultimately be asked to pay for their implementation.

4/ According to the view of the Lands Division of the Justice Department, even an individual plant manager who arranged for the disposal of plant wastes at a landfill in compliance with all existing environmental laws is jointly and severally liable for the entire cleanup costs fo the landfill. United States v. Mottolo, 22 Env't Rep. Cas. 1026 (D.N.H. 1984).

5/ A State may undertake planning or remedial activities only after entering a cooperative agreement or State contract with EPA. Superfund § 104(d). As evidenced by the book of guidance entitled "State Participation in the Superfund Remedial Program" (February 1984), EPA exercises substantial oversight and control over States acting pursuant to these agreements. In contrast, EPA has taken the position that private parties may recover their cleanup costs from "responsible parties" even though EPA or the State did not supervise or have any involvement in the planning selection, or peformance of the cleanup measures.

6/ *See* *e.g.*, Section 301(a)(1)(A) Study, pp. E-1, E-2.

The general plan for cleanup is contained in a regulation called the National Contingency Plan ("NCP").7/ Essentially cleanup can proceed either through removal actions or remedial actions. Removal actions are short-term measures, while remedial actions are supposed to provide long-term solutions. Usually after visual observation of a site and some environmental sampling,8/ EPA may decide that expeditious measures are necessary to contain, stabilize, or minimize the impact of hazardous substances which pose an immediate danger to public health or environment. Such short-term, emergency measures are accomplished through removal actions,9/ which can usually continue for 6 months or until $1 million has been expended.10/

Where a site requires something beyond emergency measures, remedial action may be appropriate. Remedial actions are those long term measures, "consistent with permanent remedy, taken . . . to prevent or minimize . . . substantial danger to present or future public health or welfare or the environment."11/ But these remedial actions cannot be undertaken

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7/ 40 C.F.R. Part 300 (1985).

8/ Once initiated, the site inspection can take anywhere from 1-6 months. Section 301(a)(1)(A) Study, 1-10.

9/ CERCLA § 101(23).

10/ CERCLA § 104(c)(1).

11/ CERCLA § 101(24).

until EPA has received assurances, through a cooperative agreement or State contract that the State will: 1) provide an acceptable RCRA facility for any offsite disposition; 2) pay 10 per cent of the capital cost of the remedial action; and 3) perform all future maintenance at the site.12/ If these conditions can be satisfied, the remedial process may then run its entire course.13/

EPA has devised an elaborate system for selecting the appropriate remedial action for a particular site primarily through the use of internal agency guidance.14/ Based on the information contained in the preliminary assessment and site investigation, EPA evaluates the potential hazardousness of a site using a computer model called the Hazard Ranking System ("HRS").15/ If a site scores above 28.5, EPA will include the

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12/ CERCLA § 104(c)(3).

13/ EPA has already narrowly construed the 10 percent cost share as applying only to remedial design and construction activities and not remedial planning activities. Memorandum entitled "Waiver of 10 Percent Cost-Share for Remedial Planning Activities at Privately-Owned Sites" (May 13, 1983).

14/ See e.g., Memorandum entitled "Participation of Potentially Responsible Parties in Development of Remedial Investigations and Feasibility Studies under Superfund" (March 20, 1984); Memorandum entitled "Superfund Compliance with Other Environmental Statutes"; Memorandum entitled "Preparation of Decision Documents for Approving Fund Financed and Responsible Party Remedial Actions"; Guidance on Feasibility Studies under CERCLA (April 1985).

15/ The selection of sites for preliminary assessment or investigation and the evaluation using the HRS are not open to public or private party participation. Office of Technology Assessment, Superfund Strategy 265-266 (April 1985).

site on the National Priorities List ("NPL"),16/ thus qualifying the site for Fund-financing.17/ The NPL listing decision is subject to notice and comment rulemaking and exclusive judicial review in the D.C. Circuit,18/ although that review has been exceedingly deferential because of EPA's position that the NPL is primarily informational and because of EPA's professed awareness of the limitations of the HRS model.19/

Once a site is listed, EPA may then begin the procedure for selecting the "cost effective" remedial action. Because of the potentially large expense ($360 million in the *Shell Oil* case)20/ and the danger of gold-plating, this decision is

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16/ The NPL is established as part of the National Contingency Plan.

17/ 40 C.F.R. § 300.68(a) (1984).

18/ CERCLA § 113(a).

19/ *Eagle-Picher Industries v. EPA*, 22 Env't Rep. Cas. 1657, 1679-1680 (D.C. Cir. April 16, 1985). The D.C. Circuit accepted EPA's characterization of the HRS model as primarily an informational tool for directing further evaluations toward the most hazardous sites, rather than as a means of deciding where to take response actions. *Eagle-Picher*, at 1679-80. Because of the preliminary nature of the NPL and the perceived lack of serious consequences attached to the listing decision, the D.C. Circuit was willing to tolerate "rough" estimates and some oversimplification. *Eagle-Picher*, at 1681. However preliminary the listing decision might be, it is the only point at which meaningful judicial review can presently occur in the Superfund administrative procedure because, consistent with the government's present arguments, the decision found truly meaningful by the D.C. Circuit -- whether a response action is warranted at a site -- cannot be judicially challenged at the time it is made.

20/ *United States v. Shell Oil Co.*, 22 Env't Rep. Cas. 1473 (D. Col. March 26, 1985). Under the Agency's current regula-

(footnote continued)

central to the administrative process and a key in future litigation. Generally, EPA begins by sending a notice letter to all potentially liable parties identified by earlier investigations, informing them of their potential liability and requesting their participation in the development and implementation of the remedial action.21/ Although EPA may later discover a few additional parties to include on this list, these are essentially the parties who will be asked to pay for the cleanup, either in direct suits brought by EPA or in contribution suits brought by the defendants in EPA's action. In most instances, EPA will then hire its contractor to perform the Remedial Investigation and Feasibility Study (called a "RI/FS" in bureaucratic jargon). This elaborate study22/ consists of sampling and analysis to determine the extent of contamination and pathways of exposure and of development and evaluation of various engineering alternatives for site cleanup. Often, a potentially liable party will also employ

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(footnote continued)

tions, the average cost of a remedial action is projected to be approximately $9 million, but with some of the regulatory changes contemplated by EPA, this average cost could go much higher. Section 301(a)(1)(C) Study, 4-4, 4-5, 4-6.

21/ Section 301(a)(1)(A) Study, 4-5, 4-6. "Participation of Potentially Responsible Parties in the Development of Remedial Investigations and Feasibility Studies under Superfund," p. 7.

22/ The guidance manual on feasibility studies is 120 pages long and contains 4 appendices.

his own consultant to perform an independent evaluation of the site and the appropriate cleanup measures.

At the conclusion of the agency RI/FS, which takes between 12 and 18 months, the Agency normally makes the RI/FS available to the public and potentially liable parties during a 21 day comment period.23/ Subsequent to the conclusion of the comment period, the Agency prepares a record of decision selecting the remedial action which the Agency believes is "cost effective" and otherwise in compliance with the statute and the national contingency plan ("NCP").24/ Once EPA finishes its decision on the selection of a remedy, EPA is committed to a particular course and is not about to change its mind. If the public or potentially liable parties disagree with EPA's analysis or conclusions, EPA and the Justice Department will vigorously resist their attempt to have a court resolve the disagreement.25/ All told, the remedial selection process involves a series of detailed studies and various other time-consuming steps which together may take between 2 and 3

23/ EPA claims that as a matter of administrative grace it keeps the community and potentially responsible parties generally apprised during development of the RI/FS. But the Agency has carefully avoided obligating itself by regulation to share sampling and laboratory data or any other type of information as it becomes available. Section 301(a)(1)(A) Study, 1-14, 1-20, 1-26, 1-27.

24/ The NCP is found at 40 C.F.R. Part 300 (1984).

25/ Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487 (D.N.J. 1985).

years.26/

Having completed its internal selection process, EPA is required by section 104(a)(1) of Superfund to determine whether potentially liable parties will voluntarily undertake an appropriate remedial action. Moreover, if there is interest on both sides, the Agency and potentially liable parties may enter negotiations to settle their respective obligations. Should private action not be volunteered or settlement not be achieved, EPA has three options for getting the remedy implemented:

1. Expenditures from the Hazardous Substance Response Trust Fund ("Fund-financed cleanup");
2. Obtaining a mandatory injunction directing selected private parties to undertake cleanup ("civil enforcement"); or
3. Issuance of a unilateral administrative order directing selected parties to undertake cleanup ("administrative order").27/

Under the first option (fund financed cleanup), the Fund pays for the detailed design and construction activity for the site. During or after the remedial action (designed as you will recall to achieve a "permanent" solution), EPA may then sue to recover the Fund's costs from present owners or

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26/ U.S. General Accounting Office, GAO/RCED-85-69 Cleaning Up Hazardous Waste: An Overview of Superfund Reauthorization Issues 29 (March 29, 1985). See also, Office of Technology Assessment, Superfund Strategy 227 (April 1985).

27/ Section 301(a)(1)(A) Study, 4-3, 4-4.

operators, past owners or operators, generators, and transporters.28/ According to the Corps of Engineers which handles the procurement of these remedial services, EPA has spent only approximately $30 million to date on remedial activities.

Under the second option (civil enforcement), the Lands Division of the Justice Department may bring a lawsuit for injunctive relief whenever there may be an "imminent and substantial endangerment" because of an actual or threatened release of a hazardous substance.29/ The Department can generally prevail in such proceedings upon presentation of a plausible theory of harm.30/

Finally, under this third option (administrative order), an EPA official may issue a unilateral administrative order against selected parties.31/ The order is not subject to judicial review either prior to its issuance or within a reasonable time after its issuance.32/ If a selected person refuses to comply without sufficient cause, he may be assessed the cleanup costs plus punitive damages of up to three times

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28/ CERCLA § 107(a).

29/ CERCLA § 106(a).

30/ United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980).

31/ CERCLA § 106(a).

32/ Industrial Park Development Co. v. EPA, 22 Env't Rep. Cas. 1593, 1598 (E.D. Pa. March 21, 1985).

the costs of cleanup.33/ To date, of these three options, EPA has demonstrated a preference for the latter two.34/

Just as in ancient days all roads led to Rome, all of the options eventually lead to litigation. And it has been the EPA's consistent position in all this litigation that each defendant is strictly, jointly and severally, and retroactively liable for all cleanup costs even though the defendant's contribution to the site is small.35/ Due to the EPA's assertion of joint and several liability, the government often selects only some of the potentially liable parties to bear all of the cleanup obligations. This selectivity may be based as much on the depth of the defendant's pocket as the degree of his contribution.36/ Naturally, under such circumstances, the selected defendants may prefer to join other parties who may be liable to the defendants for contribution or indemnification.

33/ CERCLA § 107(c)(3). Since under EPA's interpretation of the Act, the responsibility of its selected party is joint and several without any proof of causation, such a party may have to bear four times the cleanup costs for a site where his wastes or past conduct was only a minor factor in the threatened harm.

34/ 301(a)(1)(A) Study, 4-3, 4-4.

35/ For example, in the Conservation Chemical case, the Justice Department sued only 5 out of the 300 potentially responsible parties, and one of these 5 defendants was IBM which, according to the Government's figures, had contributed approximately 1/4 of 1 percent of waste to the site.

36/ "Interim CERCLA Settlement Policy," 50 Fed. Reg. 5040, col. 3; 5044, col. 3, (Feb. 5, 1985).

EPA has steadfastly resisted the joinder of additional parties for the trial of all the issues in one case, concentrating only on the effects of joinder upon its own case rather than the economics for the court and other litigants.

One federal district court judge recently referred to EPA's Superfund enforcement activities in the case before her as "an arrogance of power that is bureaucracy at its worst."37/ In its development of policies and procedures, in its exercise of response authority under the statute, in its issuance of administrative orders, and in its litigation of cases in cooperation with the Department of Justice, EPA has sought through whatever means available to free itself to operate with a minimum of interference -- by the courts, potentially responsible parties, other citizens, and even Congress.

In litigation, EPA has seized upon the innumerable ambiguities in the statute and its conspicuous omissions to manufacture through judicial "construction" the unprecedented, harsh and unfair liability regime which the Senate refused to legislate expressly in 1980. Even where ambiguities do not exist, it has strained the statute's language beyond all logic in a single-minded pursuit of unlimited freedom to impose cleanup costs on whomever it chooses. In the process it has sought to override established principles of common, corporate,

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37/ Industrial Park Development Co. v. EPA, 22 Env't Rep. Cas. 1593 (E.D. Pa. Mar. 21, 1985) real property, tort, administrative and even constitutional law.38/ And unfortunately it has on occasion misused the Act's meager legislative history.

In its regulations, EPA has moved to insulate the exercise of its discretion from any meaningful outside review by interested parties or the judiciary, substituting a Superfund-financed public relations program for compliance with the time honored provisions of the Administrative Procedure Act.39/ In

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38/ One example is the government's brief in the presently pending appeal in United States v. NEPACCO, in the Eighth Circuit where the government said:

> "In the Senate, those who opposed CERCLA protested what they referred to as the 'unfairness of its retroactive application.' See the additional views of Sens. Domenici, Bentsen and Baker, S. Rep. No. 96-848, supra, at 119-122 (1980), 1 Legis. Hist. at 426-429. Similar concerns were stated later in the House. 126 Conf. Rec. H9446-48; H9465-68 (daily ed. Sept. 23, 1980), 2 Legis. Hist. at 319-325, 356-364. Those protestations demonstrate that Congress understood that CERCLA would reach preenactment generators."

Justice here seeks to portray their successful effort in Committee to limit the retroactivity of the then proposed third-party cause of action provisions and their joint Senate Report on S. 1480, a bill Congress rejected as warning of the perils of even a narrowly limited retroactive application of new liability to third parties, as evidence that the three, and the Senate as a whole, intended liability to the Government provided for in the Senate Compromise Bill not only to be strict, joint and several but also retroactive without any limitations on the backward reach in time.

39/ This public relations program which EPA would codify in S.51's sections 117, essentially resulted from its settlement with an environmental group in early 1984.

its recently proposed National Contingency Plan regulations, EPA has skirted the Administrative Procedure Act's rulemaking process by (1) incorporating by reference (and then characterizing as legally non-binding) an expandible list of environmental standards which the remedial action must attain,40/ (2) incorporating guidance documents which did not officially exists, and (3) drafting vague provisions which place the minimum of restraint on agency action.41/ In its Superfund policymaking, EPA has simply refused to undertake even a semblance of conforming to the well-known rulemaking procedures laid out in the APA. It has instead evaded those procedures by establishing policy through internal and informal policy guidance memoranda which have not been subjected to even the spartan public notice or comment processes.42/ This has compounded the general problem of growing deference of reviewing courts to agency statutory interpretations of uncertainties as to what should in fact be included in the record for review of agency

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40/ See "Applicable or Relevant Requirements" and "Other Requirements, Advisories, and Guidance to be Considered," appended to proposed NCP and reprinted at 50 Fed.Reg. 5928-32; see also 50 Fed.Reg. 5865 col. 3.

41/ See Honabach, Toxic Torts-Is Strict Liability Read by the "Fair and Just" Way to Compensate the Victims?, 16 U.Rich.L.Rev. 305 (1982).

42/ Professor Frederick R. Andeson has described this APA avoidance process in his recent paper for the Administrative Conference of the United States, "Negotiation and Informal Agency Action The Case of Superfund" (1984).

action of what procedures should be afforded the public to participate in such proceedings and the standard of review of an agency's factual finding -- problems addressed and which would have been definable resolved by this committee's earlier S.1080. Surprisingly, on the critical "how clean is clean?" issue, the Agency has issued a guidance memorandum which effectively repeals the existing regulations and which is expected to be followed before proposed changes to the existing regulations are subjected to notice and comment.[43]

EPA in 1981 and 1982 vigorously opposed this committee's fundamental reforms in administrative procedures and judicial review embodied in S.1080. This opposition was a major factor in the demise of that bill in the House after passing the Senate 94 to 0. Against that recent history, EPA's proposals last February in S. 494, can only be viewed as an arrogant attempt to totally disregard these recent views of the Senate on key principles of administrative procedures and judicial review, and to go beyond its 1982 legislative victory and its more recent litigation victories to a "final solution." Adoption of its recommended "procedural reforms" would stamp out any residual opportunities for its chosen litigation targets to challenge its actions at a meaningful time in a meaningful manner. It would also remove the few meager limits on its discretion which Congress had built into the Superfund program in 1980. That so much of the EPA's requests for virtually discretion so contrary to the basic tenants of S.1080 could make its way into the version of S.51 reported by the Committee on the Environment and Public Works, without debate or analysis, defies explanation.

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[43] 50 Fed. Reg. 5930, col. 2 (Feb. 12, 1985).

For those of you who, like the Founding Fathers, maintain a healthy skepticism about any unchecked concentrations of governmental power,[44] the cumulative effect of this EPA campaign is sobering indeed. There will be at least three outcomes if the campaign succeeds: (1) an EPA Superfund program operating outside the laws that otherwise apply to other administrative agencies and programs, (2) an EPA-run Superfund "settlement-litigation" campaign with the deck stacked unfairly and overwhelmingly in the prosecutor's favor, and (3) an independent concurrent series of Superfund lawsuits by and among private parties which have not been considered or approved by EPA -- the federal agency charged with implementing the statute.

II. A Program Outside Administrative Law

S.51 would largely "codify" EPA's attempt to avoid timely, meaningful public participation in its administrative processes regarding the Superfund program. This is the cumulative effect of sections 108 (elimination of any meaningful ceiling on EPA "removal" actions), 126 (deferred contribution), 127 (federal lien), 131 (statute of limitations), 133 (pre-enforcement judicial review preclusion), and 134 (nationwide service of process). This unfair preclusion affects those who live near wastes sites and who want expeditious clean up as well as those who EPA ultimately selects to effect or pay for such clean up. As to the latter, the procedural unfairness compounds the substantive unfairness of retroactive imposition of strict, joint and several liability.

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[44] *E.g.*, *The Federalist No. 10* (J. Madison).

This Committee has rightfully asserted its jurisdiction over sections 126 and 133. I urge you, however, to examine the closely related provisions which would work together with sections 126 and 133 to place EPA's administration of Superfund bureaucrats outside the law which applies to other federal programs. I shall therefore proceed in analyzing these provisions to demonstrate how they are designed to work together to give EPA what amounts to virtually unlimited discretionary power -- a power totally at war with the principles underlying the Administrative Procedure Act, the further reforms you sought in S.1080, and indeed the Constitution itself.

A. The "Removal" Loophole

Only a few have perceived the impact of S.51's section 108 on EPA's administrative process. This highly technical amendment removes the monetary and time limitations on EPA expenditures at any Superfund site which Congress imposed in 1980.45/ Under the present program, the more expensive cleanups under Superfund fall into the statutorily-defined category of "remedial actions."46/ Only sites on the national priorities list (NPL) can be subject of Superfund-financed "remedial actions."47/ Moreover, Congress also required various State participation requirements in EPA "remedial actions" such as a matching share, and assurances regarding operation and maintenance expenses.48/ In contrast, Congress allowed short-term "removal" or emergency response actions of up to six months and a million dollars to be conducted, however, without State participation or NPL listing.49/

Section 108 of S.51 essentially eliminates the Superfund statute's constraints on EPA's "removal" authority by

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45/ *See* CERCLA § 104(c)(1).

46/ CERCLA § 101(24).

47/ *See* 40 C.F.R. § 300.68(a).

48/ CERCLA § 104(c)(3).

49/ Actually, this "loophole" is based on EPA's construction of the present statute and is not completely apparent from the statutory language.

allowing the Agency to "waive" any monetary or time limits on such actions whenever "continued response action is otherwise appropriate and consistent with permanent remedy."50/ In effect, the Agency would give itself authority to spend unlimited amounts for an unlimited period without any required State participation simply by characterizing its cleanup as a "removal" instead of a "remedial action."

Eliminating these Congressionally imposed intergovernmental restraints on EPA has heightened significance because of the other EPA proposed "reforms" described below; they insulate EPA Superfund decisions, such as those to "waive" the limits on a removal, from any meaningful timely public challenge or judicial review. The "removal" loophole in the otherwise applicable intergovernmental restraints on EPA Superfund activities, once widened by S.51, could transform Superfund into an unchecked expenditures program which the Act's restraints on "remedial actions" were designed to avoid. And, as we shall see from the discussion below, EPA intends to pass on virtually all the costs of the unchecked and unlimited exercise of its Superfund discretion to the private sector through unilateral administrative orders and litigation.

50/ S.51, § 108 (amending CERCLA § 104(c)(1)).

B. Section 133. Pre-Enforcement Review Preclusion

EPA has argued in court, with some success, that its exercise of authority under Superfund is not subject to judicial review unless and until the Agency seeks to impose cleanup obligations or cleanup costs on a potentially responsible party (They are called "PRPs" in EPA jargon). Where there are abuses of the administrative process, EPA's interpretation of the present law, as "codified" in S.51, allows avoidance of judicial oversight of its actions simply by declining to bring "enforcement" action. EPA's interpretation in this regard is, of course, contrary to the protections of the Administrative Procedure Act (APA) because under the APA an agency action can become "final," and therefore subject to judicial review, prior to the time the Agency may choose to seek enforcement.[51]

EPA's position regarding preclusion of judicial review under Superfund stretches credulity when it comes to the Agency's issuance of so-called "unilateral administrative orders" under Superfund § 106, and to the newly created § 104 orders requiring performance of an RI/FS.52/ Violation of a § 106 order subjects the violator to treble damages on civil penalties.53/ Preclusion of judicial review of such an order prior to the imposition of these sanctions forces a person believing an order to be invalid (1) to comply with it anyway and to forego his legal challenge or (2) to resist and risk potentially ruinous penalties. Some courts have enjoined application of the punitive damages and civil penalties of § 106 in order to avoid constitutional due process problems otherwise evident in this harsh statutory regime.54/

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[51] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). EPA has managed to avoid such a straightforward application of the APA by claiming that the emergency nature of Superfund activities will not tolerate delays. This rationale, however, does not square with the actual administration of the remedial action process. As currently structured, any emergencies are contained and stabilized by removal actions before the remedial action process begins, but then this process may take two or three years before EPA reaches an internal decision about its preferred remedy. In light of the stabilization of any immediate danger and the substantial agency delay, it surely would not subvert the statute to pause and afford aggrieved parties the due process contemplated by the APA.

EPA addressed the problem evident in § 106 in a provision now found in S.51 allowing persons complying with what turns out to be an invalid order to petition the agency for reimbursement, plus interest.55/ Not only must the innocent victim of the EPA unilateral order prove by a preponderance of the evidence that he is not liable, but also that the action he took in compliance with the invalid order was "reasonable in light of the action required by the relevant order."56/ This

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52/ Under section 119 of the bill, the Administrator may issue such orders on consent in the absence of an "imminent and substantial endangerment," as required by CERCLA § 106.

53/ CERCLA § 107(c)(3).

54/ E.g., Aminoil, Inc. v. United States, 599 F.Supp. 69 (C.D.Cal. 1984).

55/ S.51, § 133 (adding CERCLA § 113(g)).

56/ S.51, § 133 (adding CERCLA § 113(g)).

EPA "presumption of guilt" provision, while reminiscent of some tax law procedures, is unprecedented in other fields and fails to eliminate the constitutional due process infirmities which the reimbursement feature is apparently designed to address.[57]

In addition to preventing judicial review at a meaningful time, S. 51 forecloses any semblance of protecting private party rights by providing inadequate procedures to govern administrative decisionmaking for the CERCLA context and by narrowly circumscribing the scope of judicial review. Section 133 requires that: (1) judicial inquiry into the selection of a remedy or the issuance of an adminsitrative order shall be limited to a review of the administrative record; (2) an interested party must raise any objection to an EPA decision with specificity and (3) EPA's action can be overturned only if arbitrary and capricious or not in accordance with law and is not inconsistent with the NCP.

The administrative record limitation is inappropriate and unworkable in the present CERCLA context. For example, a key administrative decision intended to be subject to this limitation is the selection of a "cost effective" remedial action. Under current procedure, EPA has obligated itself to provide a

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57/ The Environment Committee's Report on S.51 refuses to acknowledge the constitutional difficulties posed by review preclusion. S.Rep.No. 99-11, 99th Cong., 1st Sess. 58-59 (1985) Moreover, as in the deferred contribution context, the need for selected parties to pay all of the costs "up front" is likely to create a disincentive for settlement.

21 day comment period on the appropriateness of the remedy recommended by the RI/FS.58/ Of course, the RI/FS is a long and scientifically complex document whose preparation has usually taken well over 12 months. It will often include substantial sampling data, toxicological data on the hazardous substances involved, geological data, groundwater flow gradients and other hydrological data, engineering data on the potential technical alternatives, and cost estimates for each alternative. To expect the public or a potentially liable party to absorb all this information within 21 days, much less prepare comments, is completely unrealistic.59/ In effect the administrative record will be stuffed by EPA and will receive from the persons directly affected only whatever meager statements several weeks can produce. Under these circumstances, it places an insuperable burden on all affected parties to require that each objection be raised with specificity during the comment period or else to have the objection barred from appeal. This requirement can only be viewed as the final means for circumscribing inquiry into the Agency's course.

Equally significant, this limitation cannot be fully understood because the constituents of the "administrative

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58/ Proposed 40 CFR § 300.67(d), 50 Fed. Reg. 5904, col. 3 (Feb. 12, 1985).

59/ Even if the community or a potentially liable party had a fully briefed consultant on call, the consultant could not give meaningful comments within this brief time.

record" are nowhere described or defined. Unlike the Clean Air Act,60/ for example, CERCLA does n[illegible] any procedures for building a record at individual waste sit[illegible], and does not prescribe the minimum data which must be contained in such a record. Without such formalized procedures, it is impossible for interested parties to know how to influence agency decisionmaking. This deficiency is serious in the case of remedy selection but becomes particularly grave in the case of administrative orders, where the full coercive force of the government is brought directly to bear on specific individuals and businesses.61/

Finally, the scope of review over agency action is unduly restrictive and quite confusing. The threshold showing

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60/ 42 U.S.C. § 7607(d) (1982).

61/ If the preclusion of pre-enforcement review is left unamended, then the administrative record must include not only the events leading to selection of the remedy but also the events occurring during the performance of the remedy. Certainly, where there has been a disagreement between EPA and affected parties over the reliability or the costliness of a particular remedial technology, it may well be relevant for the court to consider the actual price tag and performance of EPA's preferred remedy.

It is also important to note the interplay between this provision and the statute of limitations contained in section 131. Unless a specific statute of limitations is provided for these record challenges, the cases may not be tried until six years after the completion of the remedial action -- perhaps a dozen or more years after the agency's decision at issue. When the case is eventually filed, the record will be exceptionally stale, thus undermining the policies underlying statutes of limitations.

appears to be that the EPA action was "arbitrary and capricious" or "not in accordance with law." However, even if the Administrator's action was clearly unlawful under these standards, the Administrator may still prevail, provided his action "is not inconsistent with the national contingency plan." As explained above, the national contingency plan and the proposed revision are fairly vague regulations which scarcely constrain the Administrator's discretion at all.62/ Almost any administrative action is "not inconsistent" with the national contingency plan and can qualify for this statutory absolution despite its proven arbitrariness or illegality. Instead of this virtually complete circumscription of judicial inquiry, judicial review should scrutinize agency action with care and should even-handedly weigh the merits and demerits of the agency's action.

C. Section 126. Deferred Contribution

Assuming that EPA does decide to provide some defendant with an opportunity to be heard, probably by suing him in federal district court to recover costs the Agency has already incurred, under S.51 there would be no guarantee that all parties whose rights or interests are impacted by the government's case

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62/ In fact, most of the specific policy choices are made in guidance documents, which are not subject to public comment and which EPA claims to be non-binding.

will be able to participate in the proceeding, as normally would be the case in any federal lawsuit under the Federal Rules of Civil Procedure. This results from EPA's provision, incorporated into S.51, requiring the trial court to postpone third party "contribution" actions until after the conclusion of the government's case.63/ Impleader or third party practice normally permits a defendant to sue third parties who may be liable to him for claims upon which he is alleged to be liable to the plaintiff, in this case EPA.64/

The contribution deferral provision in S.51 is contrary to Rule 14 of the Federal Rules of Civil Procedure, which for the sake of judicial economy and efficiency, permit the question of a third party plaintiff's right of contribution to be resolved before the right accrues, that is, before the defendant actually has to pay the plaintiff.65/ This is central to a core policy of the Federal Rules, to avoid a multiplicity of lawsuits and to allow judges to manage cases so as to minimize the time and expense of the court and of all the parties. EPA's proposed preemption of Rule 14 in the Superfund context reduces the time and expense of only EPA itself -- by shifting

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63/ S.51, § 126 (adding CERCLA § 107(1)(1)).

64/ See 3 J. Moore, Moore's Federal Practice ¶ 14.08 (1982).

65/ Rule 14(a) states that any "defending party" may assert a claim against a third party "who is or may be liable to him for all or part of the plaintiff's claim against him."

additional and unnecessary costs to the court and to EPA's defendants. The court would have to try the facts of the case twice, first in EPA's case and then in a case between the defendants and those potentially responsible parties which EPA in its prosecutorial discretion chose not to sue. It is difficult to see why such duplicative litigation costs should be imposed on the courts and parties, especially since the government has the opportunity to convince the judge that the third party claim should be heard in a separate trial. Thus, section 126 will only be necessary where the judge has decided that it is most efficient to try the government's case and the contribution claims together.

The Environment Committee's report language on this provision indicates just how overreaching EPA's intent here actually is, extending to delay even a defendant's claim against EPA itself or agencies of the federal government. The report states, "parties with counterclaims deemed compulsory under the Federal Rules of Civil Procedure shall prove such claims after completion of the case-in-chief."66/ Federal Rule of Civil Procedure 13(a) makes claims compulsory counterclaims where they arise out of the same series of facts or transactions as the plaintiffs' claims.67/ The need for judicial economy is so

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66/ S.Rep.No. 99-11, 99th Cong., 1st Sess. 44 (1985).

67/ Federal Rules of Civil Procedure 13(a).

strong in such cases that the Rules require the defendant to raise these compulsory counterclaims or else be barred from raising them in a subsequent action. Nevertheless, where a claim against the government arises out of the same facts and circumstances as the government's claim against the defendant, EPA proposes to postpone consideration of the defendant's claim and to force the court and defendant to litigate many of the same facts in a second trial.[68]

Gene Lucero, an EPA enforcement official, during a hearing before the Environment Committee this past April, publicly announced the Agency's willingness to reconsider its contribution deferral provision because of its obvious disincentives to settlement.[69] He did not admit, of course, the provision's basic inconsistency with the Federal Rules of Civil Procedure and their emphasis on judicial economy. A draft revised EPA proposal I have seen, however, makes only cosmetic changes and continues to force courts and defendants into a wasteful second trial on many of the same issues.

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[68] This is hardly of academic interest because in the Government's largest Superfund case, the defendant is asserting a compulsory counterclaim against the Army due to its operation of the site at issue. United States v. Shell Oil Co., 22 Env't Rep. Cas. 1473 (D. Col. Mar. 26, 1985).

[69] This was at the Committee's hearing on "insurance issues" on April 3. See 15 Envir. Rep. (BNA) 2124 (Apr. 5, 1985). A similar observation could be made about the deferral of meaningful judicial review for administrative orders and the defendant's completion of the remedial action before a reimbursement proceeding becomes available. Even EPA seems to acknowlege that deferral of contribution actions should be limited to § 107 cost recovery cases brought by EPA or a state, allowing normal third-party practice in the case of private cost recovery actions under § 107(a)(4)(B) (which are themselves in the nature of third-party claims, in any case, when the private plaintiff is himself a PRP). Since there can be no prejudice to government enforcement from allowing normal third-party practice in private actions and since any deferral in such cases would fatally and unfairly prejudice a PRP defendant vis a vis a PRP plaintiff, any deferral provision should, at a minimum, be limited to § 107 cost recovery actions brought by EPA or a state.

In a related portion of the Agency's contribution provision, it is stated that a right of contribution exists in Superfund cases and that the right is governed by federal law. EPA exposes the truly narrow bureaucratic nature of its interest in the contribution question, however, in its proposal's failure to specify the criteria for the courts to apportion or limit liability under the statute.70/ Probably the most crucial contribution question left unanswered in 1980, which continually thwarts rapid settlement, is selection of these criteria, left to judicial developments by the lame duck compromise. Because of the issue's difficulty, EPA would leave the matter to continued judicial case-by-case manufacture of a "federal common law,"71/ whose parameters may not be set for decades. Creation of a new federal cause of action does little good if its contours are left entirely undefined.72/

70/ In the litigation context, however, EPA has been forced into admitting that Congressman (now Senator) Gore's proposed apportionment criteria are appropriate. United States v. Conservation Chemical Co., No. 82-0983-CV-W-5 (W.D.Mo).

71/ S.Rep.No. 99-11, 99th Cong., 1st Sess. 45 (1985).

72/ Moreover, EPA's approach may not ultimately serve even the government's narrow interest. This studied disinterest in ap-

(footnote continued)

D. Section 132. Judicial Review

Of the four provisions in S.51 upon which this Committee has chosen to focus, section 132 dealing with judicial review of agency rules under the statute[73] is the only one which moves in the right direction. I have testified before this Committee in the past in favor of provisions such as section 132, to reverse the insidious trend of the past decade of selective statute-by-statute departures from the rule of national uniformity in agency appeals -- departures that have left appellants who reside or have their places of business in the various regions of the country with no alternative but to come to Washington hat in hand, solely for the convenience of the lawyers for these specifically preferred federal agencies. Senator Domenici described this trend succinctly in the debates on the 1977 Amendments to the Clean Water Act as one in which

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(footnote continued)

portionment rests on the questionable assumption that EPA will always be able to avoid the issue in its cases by use of the doctrine of joint and several liability, which would allow it to recover its full judgment from any party it chooses to sue. If EPA turns out to be wrong about the unwavering applicability of "joint and several" to all cases, it may end up having to bring multiple lawsuits to recover its full costs as the trial courts limit each defendant's liability to his apportioned share.

[73] About the only rules currently subject to this provision are the NCP and the additions to the NPL because the majority of nationally applicable decisions are made in informal agency guidance.

Congress, "in bits and pieces" was deciding "that the circuit court system in this country has no validity" and through a "nickel and dime" series of amendments to various organic statutes was achieving the equivalent of "abolishing the jurisdictions of other circuit courts and vesting it in one national circuit court."74/ Other Senators, both proponents and opponents of exclusive jurisdiction, have characterized this trend as a movement toward "centralized" or "consolidated" national judicial decisions in Washington. I share the views of those Senators who regard this recent trend toward mandated, centralized judicial review of agency rules in the circuit court here in Washington as unwise. Thus, I, of course, urge you to reverse it in the Superfund context through prompt enactment of section 132. In fact, as some of you know, I have supported such bills as S.2419 of the 98th Congress to abolish exclusive D.C. Circuit jurisdiction across the board.

E. Closely Related Other Provisions in S.51

1. Statute of Limitations

One cannot fully appreciate how overreaching EPA's effort to insulate the Superfund program from judicial oversight is without examining its novel statute of limitations proposal.

74/ 4 Legislative History of the Clean Water Act of 1977 (95th Cong., 2d Sess.) at 1023-24.

S.51 would provide EPA with a novel "best of both worlds" statute of limitations: (1) the statute does not begin to run until completion of EPA's response action, but (2) EPA may bring its lawsuit at any time after some but not all costs have been incurred.75/

S.51's limitations provision thus allows EPA to postpone indefinitely the beginning of the limitations period by continuing to spend money at a site. Having insulated its administrative processes from meaningful judicial review prior to its incurrence of perhaps millions in response costs, the limitations provisions permit EPA to delay the day of judicial reckoning indefinitely without losing any ability to recover any of its costs, even costs incurred decades earlier. Contrary to the demands of fairness, however. EPA can sue for cost recovery at any time it chooses after costs are incurred.76/ It need not wait until completion of its cleanup if it decides not to. This is the virtual ultimate in prosecutorial flexibility. But it would be obtained at the expense of the principles of fairness, certainty or finality, which are supposed to underlie statutes of limitations.

75/ Actually, this is somewhat more limited than EPA's litigation position concerning the present statute, which is that no statute of limitation applies to EPA response actions at all. See United States v. Mottolo, 22 Env't Rep. Cas. 1529 (D.N.H. Mar. 15, 1985).

76/ See, e.g., United States v. A & F Materials Co., 578 F.Supp. 1249, 1259 (S.D.Ill. 1984).

2. Federal Lien

The persons who will watch and wait while EPA conducts unreviewable Superfund activities will extend far beyond those who are or may be liable under the statute if S.51 becomes law. This results from a remarkable new provision which EPA included in S.51 with absolutely no discussion or debate in the Environment Committee, the "federal lien." S.51's federal lien would give EPA a special preemptive priority lien on property which it decides to investigate or clean. The lien attaches at the outset of EPA's showing of interest in the property, even though its claim is unliquidated, that is, its scope and amount unknown.

The Report of the Environment and Public Works Committee says, "the federal lien does not have any priority over the perfected security interests of other creditors."77/ But new CERCLA subsection 107(m)(3) provides, "the lien . . . shall not be valid against any purchaser, holder of a security interest or judgment lien creditor until notice of the lien has been filed . . . ." This provision is certainly susceptible to the interpretation that once EPA has filed notice of the lien in the Recorder's Office, the perfected lien then takes priority over purchasers or liens filed any time subsequent to the time the government spends it first nickel. Under such an

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77/ S.Rep.No. 99-11, 98th Cong., 1st Sess. 45 (1985).

unprecedented scheme, traditional bond financing and the marketability of property would be under a grave cloud. This section should be deleted or else totally rewritten to provide that the lien takes priority only over interests filed subsequent to when EPA files effective notice of a claim liquidated by such means as a judgment.

3. Personal Jurisdiction

In addition to prohibiting those it does not choose to sue from pursuing claims they may have during the course of the Government's case, EPA tries in its so-called "nationwide service of process" provision, also now in S.51, to expand its discretion in choosing whom it may sue. Under present law, a federal court hearing a Superfund case proceeds under the standards of the long-arm statute of the State in which it sits in exercising personal jurisdiction over an out-of-state defendant. This procedure was carefully incorporated in Rule 4 of the Federal Rules of Civil Procedure.78/

The constitutional limits on a State's extraterritorial exercise of jurisdiction, based on minimum contact between a defendant and the State and the principles of "fair play and substantial justice" underlying the Due Process Clause of the Fourteenth Amendment,79/ therefore apply to a federal district

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78/ See Wehner v. Syntex, 22 Env't Rep. Cas. 1732, 1733 (E.D.Mo. Apr. 1, 1985).

79/ See International Shoe v. Washington, 326 U.S. 310 (1945).

court's exercise of jurisdiction as well. In the Superfund context, this means that an out-of-state corporation or individual who merely owns the stock of or does not have day-to-day control over the activities of an in-state subsidiary cannot be sued. The federal district court lacks personal jurisdiction over the out-of-state company. EPA is limited to pursuit of the corporations or individuals actually involved in the generation, transport and disposal activities creating environmental harm and is prohibited from recovering from innocent shareowners. Sometimes, even a generator may be outside a court's personal jurisdiction.80/ Constitutionally-required fairness demands this.

The real purpose behind EPA's "nationwide service" amendment now in S.51 is part of EPA's much more serious effort to override long-standing traditional State corporation law limits on stockholder liability by interpreting Superfund to authorize it to hold liable any stockholder who owns enough shares to control a corporation that is a "responsible party," without any proof by EPA that the relationship would justify "piercing the veil" under common law standards. The sought after preemption of all the State long-arm jurisdictional statutes is thus only a means to this end.81/

80/ Roberts v. Picillo, No. 83-0787P (D.R.I. Feb. 12, 1985) (special master's recommendation).

81/ See EPA, "Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive

(footnote continued)

EPA is apparently seeking to avoid the "fair play and substantial justice" standards which generally limit court jurisdiction, but EPA cannot preempt the Constitution. The likely result of its S.51 "nationwide service" maneuver is simply to shift the constitutional discussion from arguments over the relatively well established jurisdictional limits imposed by the Fourteenth Amendment to judicial development of an analogous but less well-established jurisdictional limit imposed by the Fifth Amendment.82/ The Government will have to argue that constitutionally-required fairness means something different for the federal government under the Fifth Amendment than for the States under the Fourteenth Amendment in order to obtain its desired benefit from S.51's "nationwide service" provision. Defendants dismissed from Superfund cases for a lack of minimum contacts with the forum jurisdiction will be forced to relitigate the fairness issues on constitutional grounds once again for no useful reason. All this litigation will occur because of EPA's unyielding search for the "deep pocket" to pay for its Superfund program instead of using the Superfund itself.

(footnote continued)

Environmental Response, Compensation, and Liability Act (Superfund), June 13, 1984.

82/ See Stephens, The Federal Court Across the Street: Constitutional Limits on Federal Court Jurisdiction 18 U.Rich.L.Rev. 697 (1985).

This is but one more example of how EPA's stubborn pursuit of its coercive litigation regime for implementing Superfund is driving it to attack established principles, in this instance limitation of stockholder liability, that are fundamental to the nation's economic system.

III. The Superfund Litigation Nightmare

The provisions discussed above all combine to vest virtually unlimited administrative and prosecutorial discretion in EPA and the Lands Division of the Justice Department. Not only do these provisions further undermine any fundamental fairness in the Superfund regime but they also proceed on the flawed assumption that EPA is in complete control of the Superfund process. As described below, various private parties may take command at particular sites, either through the citizens suit provided in section 138 of S.51 or through the private causes of action in the existing statute.

A. Section 138. Citizen Suits

Unlike the environmental legislation of an earlier decade, Superfund has created or may create a variety of causes of action which can be asserted by private parties or State or federal agencies, as described above. Section 138 of S.51 would create yet two more avenues for more litigation: (1) citizens suits against EPA for performance of non-discretionary duties and (2) citizen suits against private parties for violations of agency orders or other Superfund requirements. EPA's concern is unfortunately selfishly limited to the "citizen suits" where the Agency itself is on the receiving end of the citizen's suit to compel it to act or to enjoin it from taking ill-advised action. In this regard, the Agency's opposition to citizen suits is simply another unsurprising part of its campaign to give it maximum prosecutorial discretion. Personally, I agree with EPA that the citizen suit approach makes little sense, especially in the public works oriented context of Superfund so different from the regulatory context of other environmental statutes. Moreover, I have grave constitutional concerns about any statute which purports to delegate the exercise of governmental prosecutorial discretion to any private party, as both S.51's and RCRA'S citizen suit provision enacted last year purports to do.[83/] Such parties do not have the political accountability that our Constitution makes prerequisite to the exercise of executive power. Moreover, the observation I made in my separate statement in the Superfund § 301(e) Report urging federal preemption of punitive damages in federal status with criminal and civil sanctions is apt here: "Vigilantes have no place when the sheriff takes over."

[83/] *See* Appendix B.

EPA's concern over citizen suits against it is inconsistent with its policy of encouraging the private Superfund causes of action against private defendants under the present, unamended act. EPA's argument that citizen suits will skew a uniform enforcement and cleanup strategy, especially if new citizen suits are combined with a mandatory statutory duty to meet a cleanup schedule as proposed in several House bills, is persuasive. But the Agency's willingness to allow private lawsuits to proceed without EPA participation, influence or approval belies any uniform adherence to its policy argument and exposes the simple bureaucratic objective of a quiet, insulated and uncomplicated life.

B. CERCLA's Present and Proposed Private Causes of Action

A little recognized aspect of EPA's current "enforcement policy" is its concerted decision to allow, indeed encourage, private parties to sue so-called potentially responsible parties under Superfund.[84] Despite the Administration's professed opposition to citizen suits and the personal injury private "federal cause of action" which had been included in several bills last year, EPA has decided to "interpret" the present Act to permit private parties to sue for "response costs."[85] EPA's interpretation could allow purchasers, who received a low price because of the acknowledged existence of hazardous substances, to make substantial improvements to their property and foist the bill onto the prior owner or a number of alleged generators.

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[84] *See* proposed 40 C.F.R. § 300.71, 50 Fed.Reg. 5908-09 (Feb. 12, 1985).

[85] This "interpretation" conflicts with the courts in *Bulk Distribution Centers, Inc.* v. *Monsanto Co.*, 589 F.Supp. 1437

(footnote continued)

Despite considerable judicial authority indicating that EPA must approve a private party's cleanup measures before he can recover the costs of implementing them, EPA in its proposed new "national contingency plan" under Superfund would abandon its obligation to review such measures prior to suit. Thus, in this "quiet market" for cleanups86/ run entirely by private parties, there would be no prior review to assure that the selected measures will not exacerbate the danger to public health and that they will prove effective for the types of hazardous substances involved, as well as the site specific characteristics of geology, hydrology and meteorology. EPA thus would allow such unsupervised parties to sue independently without its knowledge or approval.

(footnote continued)

(S.D.Fla. 1984); Wickland Oil Terminals v. ASARCO, Inc., 590 F.Supp. 72 (N.D.Cal. 1984); New York v. General Electric Co. 592 F.Supp. 291, 301 (N.D.N.Y. 1984) (dictim); Cadillac/Fairview California, Inc. v. Dow Chemical Co., 21 Env't Rep. Cas. 1584, 1586-87 (C.D.Cal. 1984); and Mardan Corp. v. C.G.C. Music Ltd., 22 Env't Rep. Cas. 1223 (D.Ariz. 1984).

Under EPA urging some courts have stretched the term "response costs" to include medical monitoring and testing. Jones v. Inmont, 584 F.Supp. 1425 (S.D.Ohio 1984).

86/ Office of Technology Assessment, Superfund Strategy, 24 (April 1985).

At the minimum, this is an unsound policy decision that reflects an unduly narrow emphasis upon conserving EPA's resources at the expense of a uniform, cost-effective, long-term response to the cleanup of the nation's hazardous waste sites. The approach can also be viewed as an abdication of EPA's statutorily required oversight responsibilities.

In addition, EPA has been noticeably silent about the new federal cause of action hidden in the "health-related authorities" section of S.51.87/ This vaguely worded provision of S.51 states, "It is the sense of the Congress that the costs . . . be borne by the manufacturers and processors of the hazardous substances in question" for various laboratory and epidemiological research programs. The provision further provides that under certain conditions "the costs of conducting such a research program . . . shall be deemed a cost of response for the purposes of recovery under section 107 of such costs from a party responsible for a release of such hazardous substance."88/ The types of research studies contemplated by S.51's health-related authorities provision often cannot be organized or conducted site-by-site, making any allocation of responsibility for research funding among all Superfund defendants and manufacturers and processors completely arbitrary.

87/ S.51, § 116 (amending CERCLA § 104(i)(9)(E)).

88/ Id.

Will responsibility for research funding be assessed in nationwide "market share" lawsuits with thousands of defendants?[89] Or will EPA be able to exercise its prosecutorial discretion to select arbitrarily those who will pay for these studies from among the thousands of potentially liable parties? That EPA would acquiesce in this unworkable provision, which was included in the Environment Committee's bill both last year and this year and which surely will complicate the Superfund litigation process even further, reflects EPA's "it's not my problem" mentality about unnecessary, oppressive lawsuits.

EPA's emphasis on saving the Government's money and its indifference about the siphoning off of the private sector's resources for cleanup is further demonstrated in its Janus-like position regarding natural resource damage claims. EPA proposes to eliminate claims against the Superfund allowed by the present statute for such damages because of their large and undefined scope,[90] but it has not proposed to delete federal and State recoveries from private parties for such resources under its overbroad retroactive, strict liability theories. EPA recognizes that diversion of funds away from cleanup when it directly affects its Superfund treasury is unwise but

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89/ In this regard, I remind you that our Superfund § 301(e) Report unanimously rejected the market share concept.

90/ See Testimony of Lee Thomas Before Senate Environment and Public Works Committee, February 25, 1985.

refuses to recognize the limited nature of the private sector's funds to pay "strict liability" claims which likewise will not produce cleanup. Thus, potential retroactive, disproportionate strict, joint and several liability for "natural resources damage" could linger on for decades casting a shadow of bankruptcy over many companies and further menacing our embattled insurance industry.

C. The Key Liability Questions: Retroactivity and Disproportionality

When the Superfund Act was enacted in 1980 many thought its implementation would follow the pattern of the highly successful Clean Water Act. Most of the wastes that had been disposed of prior to enactment at the most critical sites would be cleaned up expeditiously by EPA's use of the Superfund. Indeed that is why it was called the Superfund Act. For these large and serious sites, the Act followed the Clean Water Act pattern of federally assisted cleanup of municipal sewage systems to correct for the less careful ways of sewage disposal in the past. The difference here was that instead of all of the federal funds coming from general revenues as in the municipal grants program, the bulk of the Superfund comes from new special federal tax, mostly paid by the chemical and oil industries. Both those industries, and many others including me, believe the tax is unfair and that a broader based tax would be fairer -- but that is a separate issue the Senate

Finance Committee recently considered and I believe satisfactorily resolved.

In 1980 the initial level of the fund ($1.6 billion for a five-year period) appeared inadequate. But no one then knew either the scope of the problem or the cost or pace of EPA cleanup. And, in any event, the reauthorization provision provided for a reassessment in light of practicl experience five years down the road.

All expected EPA to move forward expeditiously with actual cleanups. But that was not the case. When EPA finally did act, instead of starting to clean up sites with engineers, it started to cluster up federal courts with a series of complex, complicated lawsuits. And most of the money spent on cleanup has been on temporary measures, the so-called response costs. Thus, in the past five years all EPA has spent on remedial action totals only $30 million. I need not remind this Committee that normally litigation is the last resort in any endeavor since it is such a notoriously slow, costly and often unfair process. Certainly the nation's experience to date with EPA's coercive enforcement of Superfund has demonstrated this to be the case.

Litigation, of course, has a proper role in the overall Superfund program. But litigation should deal primarily with post-enactment conduct, and even there litigation should be the exception rather than the rule.91/ Superfund's liability

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91/ As to pre-enactment activities, those persons whose conduct made them clearly legally responsible under a federal or

(footnote continued)

definition, section 101(23), which incorporates by reference the standard of liability in Section 311 of the Clean Water Act should, like Section 311, apply only prospectively. Thus, the Superfund liability provision should play essentially the same role in Superfund that Section 311 plays in the Clean Water Act. That role is to influence present and future conduct in handling hazardous materials so as to avoid the incurrence of strict cleanup liability. The extra costs of that minimization, and relatively rare Section 311 awards, can thus be included in the price of the particular producer's products. In this way these costs can be passed on to public and "internalized" as the economists would say. But in any event, fair warning of the potential new strict liability ought to make this law, like any good law, largely self-enforcing.

Unfortunately EPA has not administered Superfund in the basic pattern of the Clean Water Act. EPA's Superfund litigation regime is a nightmare. Supersuits rather than Superfund should be the name given this program. It is well on is way to rival or surpass the litigation debacle involving asbestos and products liability. The recent report of the Senate Committee

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(footnote continued)

state law then in force might be sued by EPA for reimbursement where it cleans up under a new federal procedural remedy akin to restitution. But such a new procedure does not create a new substantive legal obligation and hence is not retroactive in the constitutional sense. See Appendix A.

on Environment and Public Works described that litigation regime in this way:

> Response sites often involve dozens or even hundreds of potentially responsible parties with differing types and degrees of involvement with the release. While the government may sue all potentially responsible parties, it need not sue all these parties. It may instead sue a limited number of parties to secure complete cleanup or all costs of cleanup under the principle of joint and several liability. Generally, the government seeks to obtain complete cleanup or to recover all of its costs. In some instances, where the government has sued major contributors of hazardous substances to a site but not lesser contributors, the parties named by the United States have in turn sued other potentially responsible parties in the same judicial action. In several cases this has resulted in massive and potentially unmanageable litigation.92/

But such suits by the federal or state governments, and the citizen suits proposed in S.51, are only the start of the litigation chain reaction. Let's call them the Round One suits. As the Environment and Public Works Report recognizes there may be subsequent suits by those held liable to EPA (or a state) in the first Round suits against missing defendants which EPA (or the state) for its own convenience chose not to name. Let's call the contribution suits the Round Two suits. Then there may be suits by either or both sets of defendants against their insurers on whether their losses were or were not covered by prior policies. Let's call them the Round Three

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92/ S.Rep.No. 99-11, 99th Cong., 1st Sess. 44 (1985).

suits.93/ And beyond the first three rounds of Superfund spawned litigation there are two other potential rounds. The fourth is suits by private parties claiming for personal injuries and property damage. Many of these suits follow in the wake of EPA's suit and seek to "piggy-back" off the Government's case. Finally the fifth round may be takeover litigation or stockholder derivative actions that may follow from the adequate or inadequate disclosure of the target's ultimate potential liability after all the smoke clears in Rounds One through Four.

The costs of Superfund driven litigation regime are staggering. In the EPA first round alone, legal and expert witness fees threaten to equal or exceed the eventual costs of cleanup. But they are only the beginning; afterwards come the legal costs in Rounds Two through Five. Think of the mounting load this coming tidal wave of litigation poses for our federal courts. And despite the swelling volume of recent EPA litigation and these outrageous costs there has been very little actual cleanup.

93/ In at least one instance EPA, apparently doubtful of the adequacy of the total resources of one chosen defendant, has brought suit itself against that defendant's insurer. United States v. Continental Insurance Co., (W.D.Mo.). Now one wonders whether EPA and Justice will seek to expand to other states the recent New Jersey and North Carolina precedents, which construe the clauses in earlier policies excepting sudden and accidental events from the exclusion of environmental liabilty coverage, to make the provisions essentially meaningless and the insurers' obligation limitless. Small comfort to the beleaguered insurance industry.

Back in 1980, many thought that because the future generation, transportation and disposal of hazardous wastes would also be carefully regulated by EPA and the States under the Resource Conservation and Recovery Act ("RCRA"), those activities would be insurable, even though in Superfund Congress did not provide a statutory limitation on liability of those facilities for a spill, leak or other incident as it had in Section 311 of the Clean Water Act. You will recall that Congress added that limitation to make certain that insurance would be available for the transportation and use of oil and petroleum products -- worthwhile economic activities we did not wish to discourage. And certainly there is no evidence that Congress in 1980 wanted Superfund to discourage or prohibit continuing American production. But that is precisely what is now occurring as a result of EPA's implementation of the Act.

The primary cause is EPA's retroactive application of strict, joint and several liability. This retroactive application of new substantive liability is contrary to the fundamental principles of the common law and longstanding canons of statutory construction. It may also be unconstitutional, particularly where, as here, the potential for disproportionate liability is so great to make awards punitive. Because of the fundamental unfairness in changing the rules of the game governing investment and contracting retroactivity, EPA has precipitated an investment/insurability crisis of major proportions. Manufacturers and insurers rightly perceive that EPA's current Superfund/RCRA enforcement policies have retroactively changed the rules of doing business in this country. Doing business here has now become unpredictable and unfair. Indeed the combined effects of strict, joint and several liability and its retroactive application have made doing business here as risky as in some unstable "third world" country.

Thus, it is not surprising that many investors are no longer willing to invest in new enterprises here where waste products must be generated and insurance underwriters can no longer calculate the risks of insuring businesses or municipalities which handle waste products. Thus, in addition to the economic hardships EPA's enforcement policies have capriciously visited on many individual businesses and insurers for past actions that were neither illegal nor tortious, the Superfund's retroactive multi-party litigation regime now threatens ongoing rejuvenation of our economy.

In the face of these realities of vanishing insurance and dwindling investments, what has EPA proposed and what has the Committee on Environment and Public Works come up with? Proposed changes in Superfund that leave the grossly unfair litigation regime in place with changes that, for the most part, would make it even more unfair. The Act as presently interpreted by EPA, and as it would be amended by S.51, would be a virtual tyrant's guidebook for arbitrary government.

The country cannot afford, either in economic or environmental costs, to allow Superfund to remain mired on a darkling plain of litigation, "swept with confused alarms of struggle and flight, where ignorant armies clash by night." After this session, do not let it be said that this Congress, confronted by the whirlwind of litigation which the sad abuses of the legislative process the 1980 Congress created, also avoided its legislative responsibilities and left any improvement to the "chance" of judicial activist innovation, which in other contexts has been so decried.

APPENDIX A

THE UNFAIRNESS AND UNCONSTITUTIONALITY OF THE RETROACTIVE APPLICATION OF STRICT, JOINT AND SEVERAL LIABILITY

While the Judiciary Committee has indicated that it may offer amendments only in four subject areas, it will also consider comments on the liability regime of the present Superfund Act (CERCLA) regime. This appendix accordingly addresses the serious questions of statutory construction, fairness and constitutionality that have been raised by the Environmental Protection Agency's attempts to apply strict, joint and several liability retroactively to persons solely on the basis of pre-enactment conduct that was neither illegal nor actionable under federal or state law in force at the time of that conduct. This retroactive application of liabiltiy that could not possibly have been foreseen by insureds or insurers has had more to do with the current collapse of the environmental insurance market in the United States than anything else, as the American Insurance Association will make clear if given an opportunity to express its views to the Committee.

I recently had occasion to brief these statutory construction and constitutional issues and to argue them orally as an amicus before the Eighth Circuit in the still pending appeal in United States v. Northeastern Pharmaceutical and Chemical Co. (Case No. 84-1837 WM). I had raised similar arguments as to the retroactivity of both Superfund and the Resource

Conservation and Recovery Act in motions still pending before the U.S. District Court for the Eastern District of Missouri in United States v. Bliss, et al. Unfortunately, in both forums counsel for the Government have elected to rely solely on the "rational basis" test of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975) and have not replied to the arguments on separation of powers and punitive sanctions spelled out below.

Since the issues posed have far reaching consequences, I thought that the Judiciary Committee, with its long-standing record of devotion to basic fairness and constitutional principles, would wish to consider them in your deliberations. When S.51 eventually comes to the Senate floor, amendments may be offered to bar any retroactive application of new substantive Superfund liability and to replace joint and several liability with a fair apportionment provision. Your views as to the unfairness of EPA's present liability regime and the seriousness of the constitutional problems presented by EPA's present interpretation, could be decisive to the adoption of such amendments.

This appendix accordingly contains the essence of those as yet unanswered arguments.

SUMMARY

The Superfund Act was an eleventh-hour political compromise. As one court recently observed, it is "marred by vague terminology and deleted provisions." United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. Jan. 31, 1984). Every court interpreting the statute, therefore, has been faced with the dilemma of divining Congress' intent regarding the act's major substantive provisions. The several district court decisions upholding EPA's application are fatally flawed because in giving Superfund retroactive effect, by applying a new federal substantive liability (strict, joint and several and without any requirement of proof of causation), they have ignored (i) the strong presumption against retroactive construction and (ii) failed to consider the grave constitutional problems discused below that flow from such a retroactive application.

Avoidance of the constitutional issues requires that Superfund's new substantive liability provisions be applied prospectively only. EPA has argued, however, that the courts should interpret CERCLA as creating an entirely new, substantive federal liability for pre-enactment conduct. Compounding the disregard of time-honored traditions of cautious evolution of the common law, EPA argues that this new liability should be not only strict, but also joint and several. Thus, a person faces potentially crippling joint and several liability for actions that were neither illegal nor actionable when taken (i.e., non-criminal and non-negligent and that may have contributed only slightly to the harm, EPA persistently calls these persons "responsible parties," implying that they have done something illegal, actionable or blameworthy. But EPA has steadfastly refused to offer any evidence to that effect. Thus, those labeled are "responsible" only in the sense that EPA has selected them, often from among many others, to pay the costs of clean up. The manifest unfairness of the EPA's position underscores the rationale for applying Superfund's liability provisions prospectively only.

Prospective application would by no means eviscerate the act. To the contrary, the statute quite reasonably can be interpreted to have created a new federal procedural remedy (as contrasted with new substantive liability) for pre-enactment conduct that was either illegal or actionable under preexisting federal or state law. This would still leave EPA with two broad classes to help it effect cleanup either through injunction or money damages. The first includes persons whose *post-enactment conduct* or *post-enactment status as owner or operator* connects them with the wastes. The second includes persons whose pre-enactment conduct was *either illegal* or *actionable* under applicable state or federal law. This subgroup of pre-enactment generators were already "*legally responsible*" when Superfund was enacted. But it would *not* include the subgroup of pre-enactment generators *whose conduct occurred solely prior* to the date of enactment *and* whose conduct *was neither illegal nor actionable under applicable state or federal law.* This is the group a Justice Department employee once referred to when he said "the government is perfectly prepared to punish the innocent for the sins of the guilty." [p. 121 of the Senate Report on S. 1480, which appears at p. 28 of the Leg. Hist.] In view of strong exceptions taken by Senators Domenici, Bentsen and Baker to such an unprincipled, draconian policy, it is reasonable to conclude that the final Senate Superfund compromise bill, in which all three played a prominent role, did not intend to give to EPA power to punish this class through imposition of retroactive, strict, joint and several liability.

The district courts that have accepted EPA's interpretation of Superfund have acted in the face of a monumental congressional default on crucial matters of policy that ought never to be decided by the judicial branch. In applying Superfund retroactively, without addressing squarely the important constitutional issues raised by such a construction, these district courts have abdicated their responsibility as the final guardians of separation of powers.

Interstitial decision-making by the judiciary is unobjectionable. But what has occurred in these decisions constitutes a radical departure from the federal courts' traditional role. Instead of interstitial decision-making, at EPA's urging these courts have started to create an entirely new body of federal common law in this area and to impose unfairly new, potentially massive, disproportionate liability for actions that were fully lawful when taken. Even though Congress may have intended the courts to resolve policy issues our elected representatives were unable to resolve, the federal courts cannot step into the breach without upsetting the delicate balance created by the Constitution's framers.

EPA's construction of the Superfund Act also violates longstanding constitutional restrictions on how the government may punish the citizenry. Strict joint and several liability, applied retroactively, can result in sanctions that, because of their severity and disproportionality, are far more punitive than remedial. Retroactive application of these penalties cannot be reconciled with constitutional principles reflected in ex post facto and bill of attainder prohibitions, the Eighth Amendment's prohibition on excessive fines or the Due Process Clause's requirements that property taken by the sovereign for prior conduct be roughly proportionate to the offense.

These constitutional problems can be avoided by carefully construing Superfund, or amending it, to provide only a remedial structure to address pre-enactment conduct, the substantive content of which derives from state law in effect at the time of the conduct except where there was a violation of some other federal statute in effect at the time.

ANALYSIS

I. THE SUPERFUND ACT SHOULD NOT APPLY TO PRE-ENACTMENT CONDUCT THAT WAS NOT ACTIONABLE OR ILLEGAL UNDER PRIOR FEDERAL OR STATE LAW.

New laws rarely apply retroactively. The common law and the Constitution erect substantial barriers to imposing new liability for past conduct that was blameless when performed. A cardinal principle of statutory construction -- the presumption against retroactivity -- has evolved from this tradition.

A. The Presumption Against Retroactivity in Supreme Court Decisions and the Common Law

A statute applies retroactively when it "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156). Justice Story's oft-cited formulation plainly applies to EPA's interpretation of Superfund.

EPA's retroactive application of CERCLA triggers the constitutional concerns discussed later in this appendix. But initially that interpretation triggers a fundamental rule of statutory construction--the presumption against retroactive application--articulated by the Supreme Court in Greene v. United States, 376 U.S. 149 (1964):

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'

Id. at 160 (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913))(emphasis added); accord Miller v. United States, 294 U.S. 435, 439 (1935) (retroactive application precluded "unless the legislative intention to that effect unequivocally appears").1/

This rule of statutory construction is constitutionally based, as discussed below, and is deeply rooted in the principles of the common law Thus, Blackstone noted that one of the common law's fundamental characteristics is that it is "a rule prescribed." Blackstone, Commentaries on the Law of England 43 (Christian's ed. 1818). By this he meant that "it is requisite that this resolution [of the legislation] be notified to the people who are to obey it." Id. Thus "[a]ll laws should be . . . made to commence in futuro, and [those affected should] be

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1/ EPA's reliance on cases like Chicago & Alton R. Co. v. Tranbarger, 238 U.S. 67 (1915), is misplaced. Those cases hold merely that a regulatory requirement imposed on an ongoing activity, such as maintenance of a railroad bridge, cannot be characterized as retroactive. The underlying rationale of Tranbarger is that an ongoing enterprise is on notice and at risk that new regulatory burdens may be imposed as a condition of continuing the enterprise. That rationale is inapplicable in most off-site, multi-generator Superfund cases because there is no conduct, such as disposal site ownership or operation, that took place after enactment of Superfund.

Similarly, Justice Story's emphasis on new obligation, new duty, and new disability distinguishes those decisions that sustain establishment of a new remedy to enforce an existing obligation. EPA's position is not supported by those decisions, because as a matter of standing policy EPA does not allege that the pre-enactment conduct gave rise to liability under then-existing state law.

notified before their commencement." *Id.* at 45. He explained that where a law is *ex post facto*: "[I]t is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no course to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust." *Id*. Blackstone was only restating what Lord Coke had stated earlier: "Thus Coke declared that no Act of Parliament should be construed.in such a way as to do a man damage when he was free from wrong. Also, he maintained that one was punished or injured if he were affected disadvantageously by the retroactive application of law."2/

Justice Holmes in his definitive lectures on the common law made it clear that this requirement of prior notification applied in the law of torts as well as in criminal statutes. The central theme of his second lecture on "Theory of the Law of Torts" is that "people should not be made to pay for accidents which they could not have avoided." O. W. Holmes, *The Common Law* 149 (1923). He concluded, "But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril." *Id*. at 163.

2/ Snead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936). Where the disadvantage is in the form of liability to the sovereign, Coke's view is consistent with Magna Carta's limits on "amercements." *See infra* part II.B.2.

The primary question posed by EPA's interpretation is whether Superfund imposes a new liability retroactively as advocated by the government. More precisely, the question is whether, in the words of Miller v. United States, 294 U.S. 435, 439 (1935), a "legislative intention to that effect unequivocally appears" or whether, under the test of Greene v. United States, 376 U.S. 149, 160 (1964), this new liability will be found in "the unequivocal and inflexible import of the [statute's] terms, and the manifest intention of the legislature."

B. Superfund's Application to Pre-Enactment Conduct

1. EPA's Construction of CERCLA's Section 107

EPA contends that CERCLA imposes a new obligation with respect to past conduct. The liability is not based on fault, nor on circumstances excusing proof of fault; it is a no-fault liability. The liability is not based on proof of causation. If an off-site generator has arranged for deposit of wastes at a site and if material of the same type remains at the site, the burden of proof of causation--an impossible burden in some cases--shifts to the generator. The liability is not several, based on proportionate contribution to the harm. If an off-site generator cannot prove divisibility of the harm--also an impossible burden in some cases--the generator is liable for the entire harm, even if it is only a minor contributor. This grossly inequitable result is compounded by the absence of a statutory provision for contribution.

The critical provision of Superfund on liability is section 107(a), which reads in part as follows:3/

> (a) Notwithstanding any other provision or rule or law, and subject only to the defenses set forth in subsection (b) of this section -
>
> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable . . . .

3/ The scope of liability under Superfund § 106 is no greater than that of § 107. See United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D.Ill. Jan. 20, 1984); United States v. Outboard Marine Corp., 556 F. Supp. 54, 56 (N.D. Ill. 1982); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112-13 (D. Minn. 1982). It could, however, be much less. See United States v. Wade, 546 F. Supp. 785, 792-94 (E.D. Pa. 1982) (Superfund § 106 does not apply to past non-negligent off-site generators). Thus Superfund § 107 defines the outer limits of Superfund's scope of liability.

Section 107(a)(3) imposes liability on off-site generators who "arranged for" disposal, treatment, or transportation of waste. EPA argues that the past tense of the phrase "arranged for" evidences congressional support for retroactive application. But this argument ignores the reality that liability under section 107 is triggered by the "release or threatened release" of waste, not by the arranging for its disposal or treatment. Thus, the tense of the word "arranged" simply reflects the fact that an "arrangement" always is necessarily antecedent to the release.

EPA's second argument based on statutory language is equally tenuous. The last sentence of section 107(f), 42 U.S.C. § 9607(f), precludes recovery for damages to natural resources where such damages and the release causing the damages have occurred wholly before the enactment of CERCLA. From this EPA contends that Congress expected the rest of the act to apply retroactively. Section 107(f), however, suggests no more than that section 107 and related sections 104 and 106 have some application to pre-enactment conduct. It tells us nothing about the crucial question regarding the basis on which it is to be applied--state law applicable at the time of the conduct or some new ground of substantive federal liability to be found in Superfund.

It is on this crucial question of the basis of liability that EPA's contention fails. A provision that liability would be "strict, joint and several" was deleted from the bill before final enactment. Substituted for this provision was a definition of "liable" and "liability" in section 101(32), 42 U.S.C. § 9601(32), which provides that:

> "[L]iable" or "liability" shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act.

Although the standard of the Federal Water Pollution Control Act (section 311, 33 U.S.C. § 1321) has been construed to be strict liability, (i) it is prospective only, (ii) it applies only to current owners or operators of vessels or onshore or offshore facilities (i.e., persons currently able to comport their conduct to the new standard and to insure against liability for lapses), and (iii) it is subject to monetary limitations on recoverable damages.4/

In short, there is no express language of Superfund to support liability for pre-enactment conduct in the terms advocated by the government. EPA can point to no provision that satisfies the Greene test of "unequivocal and inflexible import of the terms, and the manifest intention of the legislature," or the Miller test of a "legislative intention" that "unequivocally appears."

4/ The cap on liability was part of a compromise that was intended to assure the continuing availability of insurance, thereby not deterring industrial activities necessary to the nation's economy.

2. The Legislative History of Superfund

One court has characterized the legislative process that led to the enactment of Superfund (CERCLA) as follows:

> CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions . . . . [N]umerous important features were deleted during the closing hours of the Congressional session . . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.

NEPACCO, 579 F. Supp. at 838 n. 15 (citations omitted).

Having accurately found the statute to be flawed, its legislative history to be opaque or missing altogether, this district court inexplicably went ahead to fill the legislative void. As noted above, however, the statute's express language provides no basis for judicial interpretation in favor of retroactivity. As discussed below, neither does the legislative history.

The most reliable sources of legislative history usually are Conference Reports and Committee Reports. The action on Superfund was so hasty that there was no Conference Report. Moreover, the earlier House and Senate bills were so extensively revised that the Committee Reports on those bills are largely irrelevant.

What remains is an effort on the part of proponents of particular points of view to "manufacture" legislative history in the final hours by making statements in the Congressional

Record, some of which were not even delivered on the floor. Not surprisingly, these statements are sometimes flatly contradictory. About the only reasonably reliable and relevant conclusions that can be drawn from these statements taken collectively are:

(i) There was no political consensus on crucial issues as to the basis of liability (such as to which kind of strict liability as to prospective conduct or as to strict liability versus fault liability as to pre-enactment activity) or on several liability versus joint and several liability;

(ii) Other crucial issues such as rights of contribution were not contemporaneously considered;

(iii) The difficult questions as to the basis of liability were finessed by declaring that they would be resolved by the courts as a matter of federal common law; and

(iv) On the specific issue of liability for pre-enactment conduct, there were two conflicting points of view not resolved one way or the other in the language of Superfund. One point of view was that persons who arranged for disposal of hazardous wastes at an existing site should somehow be held responsible for any required cleanup. A contrasting one was concern about the unfairness and potential unconstitutionality of any retroactive application.

EPA argues that Congress intended the statute to be employed to effectuate a cleanup of old dumpsites, and that "responsible" parties should be required to bear a proper share of the costs of such cleanup.[5] This argument is valid up to a point but it tells us nothing about the Congressional intent as to how "responsibility" (liability) should be determined and imposed for pre-enactment conduct. Did Congress intend responsibility to be determined by state law applicable at the time of the conduct, or by some new retroactively prescribed federal standard of liability to be determined by the courts as a matter of federal common law? If the former -- applicable state law as to pre-enactment conduct -- is chosen, it avoids retroactivity and unconstitutionality and yet leaves the government two broad classes of "responsible" persons to pursue for cleanup or cleanup costs: first, those whose pre-enactment conduct was actionable under state law (the "guilty" or "blameworthy") and, second, those whose conduct or responsibility in connection with waste disposal occurred, at least in part, after the date of enactment. But EPA has consistently rejected such an interpretation.

Yet another argument relied on by EPA is that the initial funding of the statute is plainly inadequate to provide for the required cleanup unless the funds are supplemented by a regime of private liability. See State ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983). This argument fails on two scores. One, it again tells us nothing about the basis for such private liability; two, the reauthorization provision in the statute makes clear that Congress comtemplated that the funds might have to be materially increased from time to time. Indeed, the Senate Finance Committee recently recommended a substantial increase in the funds available as well as a broadening of the tax base.

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[5] See NEPACCO, 579 F. Supp. at 839-41.

What little legislative history exists suggests strongly that as to pre-enactment conduct, Superfund provides only a new federal procedural remedy, but not a new substantive liability, for past conduct already actionable under state law. It does not show a "manifest" or "unequivocal" congressional intention to impose a new federal substantive liability for pre-enactment conduct. Most clearly, the legislative history affords no support at all for EPA's view that Superfund creates strict, joint and several liability for past acts without regard to causation.

C. Superfund's Enactment and the Resolved Policy Choices

The Superfund Act and its legislative history, which is as cloudy as the statutory language and even more confusing, must be evaluated in light of the longstanding presumption against retroactivity. Analyzing Superfund in this context leads inexorably to the conclusion that Congress did not clearly or unequivocally intend for the law to apply to past conduct. Moreover, Congress left open the most important questions raised if Superfund is read to create a new, retroactive liability.

The legislative history does reflect a general belief of Congress that those "responsible" for current hazards by reason of previous conduct should somehow be made to pay the costs of remedial action. But the history is totally without illumination as to the key elements of how to determine legal responsibility for pre-enactment conduct. Congress tried to set the standard of liability, but the peculiar method it chose (incorporating by reference the Water Act section 311 standard) does not answer the questions raised here. Congress did not even attempt to resolve issues regarding causation, joint and several liability, contribution, and the effect of settlement.6/

6/ The void created by the statute's silence and the legislative history's ambiguity leave no acceptable alternative but to construe Superfund as providing a new federal remedy for preexisting state law liability for pre-enactment conduct. This interpretation is compatible with modern case law construing section 115 of the Restatement of Restitution in a context where a public authority incurs costs that a private person was independently obligated to pay. In those decisions, the public authority has been allowed recovery against private persons on traditional restitutionary or unjust enrichment principles. See United States v. Consolidated Edison of New York, Inc., 580 F.2d 1122, 1127 (2d Cir. 1978); Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 263 N.W.2d 326, 328 (1977). See also Federal Tort Claims Act, 28 U.S.C. § 2674 (creating a federal remedy that derives its content from the law of the forum state). To interpret Superfund otherwise, and apply it retroactively, would obligate federal courts to resolve de novo

(footnote continued)

1. Causation

Under the law of most of the states, causation can be resolved on the basis of familiar and universally accepted notions of cause-in-fact, legal (or "proximate") cause, and burden of proof. If, however, federal courts are to make new federal common law of causation, they must address the situation exemplified in numerous Superfund suits where (i) a large number of generators have arranged for disposition at a particular site of a wide variety of chemically different wastes, (ii) the chemical nature of a release or threatened release from that site cannot be reliably determined, and (iii) the particular source of the release (which generator's wastes) cannot be traced.

(footnote continued)

as a matter of federal common law the crucial questions that Congress ducked. Interestingly, EPA in other contexts takes the position that Superfund liability is equivalent to liability under Restatement of Restitution § 115. See United States v. Northeastern Pharmaceutical and Chemical Co., 19 Env't Rep. Cas. (BNA) 2186 (W.D. Mo. Sept. 30, 1983). Were a legislature to provide for restitution remedies which are not linked to preexisting obligations and understood criteria for their award and thus left to court discretion, the scheme would risk unconstitutionality. Cf. United States v. Welden, 568 F. Supp. 561, 535 (N.D. Ala. 1983) (striking down provisions of the Victim and Witness Protection Act requiring restitution to victim by person convicted of federal crime.) ("[T]he probability of disparate results in different federal courts is so great. . . that it is impossible to look forward to enough equality of application to comply with 'equal protection.'").

EPA has persuaded one district court that any generator it elects to sue is liable for all the costs caused by the release if the site still contains any wastes, no matter how small, chemically similar to those disposed of by the generator, unless the generator can sustain the burden (which may be technically impossible) of proving that its particular wastes could not have caused the harm. See United States v. South Carolina Recycling & Disposal, Inc., 20 Env't Rep. Cas. (BNA) 1753 (D. S.C. Feb. 23, 1984). Thus the court in South Carolina Recycling, like the court in the NEPACCO case, created significant new retroactive liability as a matter of federal common law, without congressional guidance and apparently without realizing that it was doing far more than traditional interstitial gap-filling. See also United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983).

2. Joint and Several Liability

As noted, Congress deleted from the text of the statute a provision that liability would be joint and several. This is an issue closely related to that of causation. Its resolution, like that of the causation question, can in a single case alter ultimate liability by hundreds of millions of dollars. Again, it is an issue that the federal courts are called upon to resolve because of congressional abdication.

The final Superfund bill deliberately avoided the issue. One attempt to face it (the Gore amendment) was accepted by the House but not incorporated into the Senate compromise. The Gore amendment recognized that there are serious questions of fairness involved in a literal and unqualified application of joint and several liability to hazardous waste disposal.[7/] One traditional limit on application of joint and several liability--proof of divisibility of the harm--is simply not workable in the complex situation present at sites where wastes of different character and from many sources are mingled and stored. Where proof of divisibility is not practicable, it is plainly unfair to impose joint and several liability on a minor contributor to the total volume. This inequity is compounded where the defendant's waste may be substantially less harmful than other wastes present at the site or only minimally involved in the actual or threatened release into the environment. Thus, extension of the concept of joint and several to no fault contexts carries it far beyond its common law origins where it has been applied sparingly only in situations involving criminal or negligent conduct, e.g. simultaneous

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[7/] At lease two district courts have been so concerned with the unfairness of joint and several liability in such a context that they in effect wrote the Gore amendment back into the statute. United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1909-10 (C.D. Cal. Apr. 5, 1984), United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. Jan. 20, 1984).

misfeasance (two men shooting guns simultaneously at one person, who is struck by only one of the bullets) or conspiracy.

3. Contribution

Joint and several liability is normally applied in conjunction with a right of contribution, which limits the severity of the rule. But Superfund is totally silent on rights of contribution, and its legislative history affords no guidance. Implying such rights as a matter of federal common law cannot be reconciled with the contrary decisions of the Supreme Court in Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) (no federal common-law right of contribution with respect to liability under the Equal Pay Act), and Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (no federal common-law right of contribution with respect to Sherman or Clayton Act liability). These two decisions rely on United States v. Standard Oil Co., 332 U.S. 301 (1947) (recognition of a cause of action on behalf of the United States against a tortfeasor injuring a serviceman is a matter for congressional determination and cannot be created as a matter of federal common law). These three decisions demonstrate the total untenability of EPA's contention that Congress may default and delegate to the courts policymaking responsibility for determining retroactive allocation of massive economic burdens.

4. Effect of Settlement

Many states provide either by judicial decision or by statute for contribution and for related rules on the effect of a settlement by one defendant on cross-claims among defendants. The issues are complex, as illustrated by the Uniform Comparative Fault Act, 12 U.L.A. Civil Proc. and Rem. Laws 35 (1984 P.P.), and the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. Civil Proc. and Rem. Laws 57 (1975). These statutes, unlike Superfund, address matters such as:

(i) the basis of contribution, pro rata versus comparative fault;

(ii) the effect of a settlement by one defendant on claims by that defendant against the remaining defendants and on claims by the remaining defendants against the settling defendant; and

(iii) the extent to which a settlement reduces the claim of the plaintiff against the remaining defendants.

Some of these questions are of critical importance in Superfund litigation, which frequently involves numerous defendants, large monetary claims, complex issues of fact and law, and heavy litigation expenses. Like other large, complex cases, Superfund enforcement actions should usually be settled. Yet the obscurity of the statute on joint and several liability and on rights of contribution is compounded by its total failure to provide guidance on the effect of a settlement by one of several defendants. Here again Congress simply did not address the issue.

D. Policy Choices and Federal Common Law

The inadequacies of Superfund are not simply the product of oversight. At least as to the standard of liability (fault versus no-fault) for retroactive application and as to joint and several liability, there was no political consensus. The record also shows that had the construction advocated by EPA been spelled out in the statute, it probably could not have been enacted. The record is clear that the liability provision and, since they were interrelated, probably the tax provisions creating the two funds would not have been passed unless Congress avoided some major policy choices and delegated them to the courts to be resolved as a matter of federal common law.

To read the statute as EPA urges and to leave Superfund's key provisions for completion by the judiciary is totally incompatible with separation of powers principles, under which policy decisions are to be made by Representatives and Senators who can be reelected or voted out of office at the next election.

If the courts were to apply to past conduct the liability ground rules applicable under state law at the time of the conduct, there would be ready-made answers to many of the cases outlined above. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979). If, to the contrary, federal courts are constrained to fabricate a whole new body of federal common law case by case, it will be years, perhaps decades, before differences among the district courts and among the circuits can be finally resolved.

This prudential concern is reinforced by more fundamental considerations relative to the role of the federal courts in our constitutional system. State courts, within the boundaries imposed by federal and state constitutions and legislation, have a plenary power to make common law. It is within their power, for example, to extend the scope of liability for negligence, as in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), or to dispense with the need to prove negligence, as in Greenman v. Yuba Products Co., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

The lawmaking power of the federal courts, however, is significantly more limited. As the Supreme Court noted recently in its unanimous decision in Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981):

> Although it is too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common law tradition, it remains true that federal courts, unlike their state

> counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.

Accord. Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-46 (1981) (unanimous decision); United States v. Standard Oil Co., 332 U.S. 301, 307-11 (1947). Apart from areas where federal authority is primary or exclusive (e.g., the conduct of foreign relations), the power of the federal courts to declare common law is limited to interstitial lawmaking--that is, to filling in statutory gaps on subsidiary issues.

Under EPA's interpretation of Superfund, the federal courts are asked to resolve issues which are clearly matters of policy that mark the outer bounds of jurisdiction and authority. These issues are not matters of interstitial interpretation. Moreover, Congress probably would have resolved them adversely to EPA's present position, had it not deliberately chose not to resolve them because it was unable to reach a political consensus. To ask the federal courts to undertake wholesale policymaking is contrary not only to the whole tradition of the common law, but also, as argued more fully below, to our constitutional system.

II. RETROACTIVE APPLICATION OF SUPERFUND AS PRESENTLY WRITTEN VIOLATES CONSTITUTION PRINCIPLES OF SEPARATION OF POWERS AND WOULD IMPOSE RETROACTIVELY DISPROPORTIONATE PENALTIES OFFENSIVE TO DUE PROCESS, THE EIGHTH AMENDMENT, AND THE EX POST FACTO AND BILL OF ATTAINDER PROHIBITIONS

Adoption of EPA's interpretation of Superfund squarely presents serious constitutional problems. They fall into two categories: whether the Constitution will permit (1) massive policymaking by the courts and (2) retroactive imposition of penalties that potentially can be vastly disproportionate to the sanctioned conduct. The Constitution will tolerate neither.

A. EPA Construction of Superfund Improperly Calls Upon the Federal Courts to Perform Legislative Policy-Making Functions

1. The Unconstitutionality of "Standardless Delegation"

The Constitution of the United States contemplates that the Congress shall make law. For that reason, the various sources of federal lawmaking authority are set forth in article I as powers of Congress. *See* U.S. Const. art. I., § 8. In a republic, sovereignty rests ultimately in the people, and that sovereign power therefore should be exercised by the branch of government most directly accountable to the people--namely, the legislative branch. Other branches have other powers, but it is a cardinal principle of American government that they should remain separate.

The constitutional separation of powers has long been understood to forbid the wholesale delegation of legislative authority to either the executive or the judicial branch. The chief vice of such delegation is that it enables the legislature to evade political accountability. Additionally, legislative delegation may leave the courts without meaningful standards for the exercise of judicial authority to decide specific cases. The constitutional structure is in both respects ill-served.

A recent Supreme Court decision establishes that the constitutional bar against standardless delegation of legislative authority is still vital. In Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980), the Court invalidated a standard for benzene in the workplace set by the Secretary of Labor under authority of the Occupational Safety and Health Act. A plurality of the Court found, contrary to the contention of the government, that the statute did not give the Secretary unbridled discretion to set any standard, regardless of the lack of demonstrable risk, but required a reasonable relation between benefits and costs. Id. at 651-52. Under this interpretation, the plurality avoided the delegation issue, but made clear that it regarded the doctrine as one of continuing vitality:

> If the Government were correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an

> understandable way, the statute would make such a "sweeping delegation of legisltive power" that it might be unconstitutional under the Court's reasoning in A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539, and Panama Refining Co. v. Ryan, 293 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

Id. at 646. Another justice, Justice Rehnquist, was unable to read the statute so narrowly, but concurred in the judgment on the ground that the act made a standardless delegation of legislative authority to the Secretary and was for that reason unconstitutional. Id. at 671.

As Justice Rehnquist's concurrence recounts, the delegation doctrine fell into disfavor due to its contemporaneity with the discredited doctrines of the pre-New Deal era, especially "substantive due process" restrictions on economic regulation. Id. at 686. Yet, as Dean Ely has pointed out, this is "a case of death by association." Id., citing J. Ely, Democracy and Distrust, A Theory of Judicial Review 133 (1980). The excesses of judicial policymaking that characterized those early cases are in no way involved in the delegation issue. In fact, judicial refusal to accept the wholesale delegation of legislative responsibility is one way to make sure that the function of the courts remains within constitutional bounds. The delegation doctrine, therefore, is not an invasion of legislative authority, but an incentive to its proper use.

Of course, no one contemplates that the separation of powers should be absolute or that every delegation of legislative power should be disapproved. The standard is that enunciated by Chief Justice Taft speaking for the Court in J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928):

> This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

Id. at 406 (emphasis added). And where "common sense and the inherent necessities of the governmental coordination" require the delegation of legislative power, Congress need only lay down an "intelligible principle" to guide its exercise. Id. at 409. Thus, the delegation doctrine does not demand legislative detail. But it does demand that basic policy choices be made, as the Constitution directs, by Congress.

On any reading, save the reasonable alternative construction advanced above that avoids retroactive application of a new federal substantive standard of liability, Superfund fails this test. In fact, if any statute of the last quarter century warrants careful scrutiny under the delegation doctrine, Superfund is it. Here the Congress came to no consensus on issues such as joint and several liability. It did not address issues such as the rules of causation, burden of proof, and contribution. It did not even meaningfully resolve the standard of liability. These are basic policy choices, not subjects for interstitial lawmaking. The abdication of legislative responsibility to resolve issues such as these undermines the political accountability that the Constitution meant to ensure. It also foists on the courts the burden of resolving major questions of economic policy in the absence of legislative consensus and without guidance from any "intelligible principle" of legislative choice. In short, it raises grave problems regarding separation of powers.

2. Statutory Construction and the Separation of Powers

One reason that relatively few statutes are invalidated for standardless delegation is that the courts struggle to save them by pruning excessively broad delegations of authority to the executive branch and refusing to exercise legislative power where Congress has defaulted.

A good example is Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980), in which the plurality was able to read the statute to avoid the delegation infirmity. Similarly, in National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), the Court ignored portions of a statute authorizing the Federal Communications Commission to impose fees on cable television companies. Id. at 344. The Court justified its decision chiefly on the ground that reading the statute literally might have accomplished an impermissible delegation of legislative power under A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928). Id. at 342. The lesson of these cases is clear: where possible, courts should construe statutes so as to avoid open-ended delegations of legislative authority.

This message is strongly reinforced by the Supreme Court's recent decisions concerning the "implication" of private rights of action under federal statutes. Traditionally, the federal courts were reluctant to create a cause of action where none was expressly recognized by statute. See, e.g., United States v. Standard Oil Co., 332 U.S. 301 (1947) (refusing to recognize a cause of action for recovery by the United States for tortious injury to one of its soldiers); United States v. Gilman, 347 U.S. 507 (1954) (refusing to create a cause of action on behalf of the United States against an employee whose negligence resulted in government liability under the Federal Tort Claims Act). These innovations were not rejected as bad policy, but as decisions that only Congress could make. Thus, the essentiality of legislative action was respected.

In subsequent years, the Court was induced to depart briefly from this sound principle by "implying" private rights of action under federal statutes that did not expressly provide for such enforcement. The seminal decision was *J. I. Case* v. *Borak*, 377 U.S. 426 (1964), which seemed to imply that the federal courts were empowered to create a private right of action whenever it seemed wise or necessary to do so. To the same effect was *Cort* v. *Ash*, 422 U.S. 66 (1975), where the Court identified legislative intent as only one among several factors to be considered. *See id.* at 78 ("[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?").

But the beginning of the end of this kind of freewheeling judicial policymaking was signalled in Justice Powell's dissenting opinion in *Cannon* v. *University of Chicago*, 441 U.S. 677, 730 (1977). Justice Powell pointed out that the *Cort v. Ash* approach encouraged political default by Congress and "allows the Judicial Branch to assume a policymaking authority vested by the Constitution in the Legislative Branch." *Id.* at 743. Because of the particular history of the legislation at issue in *Cannon*, Justice Powell's views did not prevail on the facts of that case, but his approach was unequivocally adopted by the Court in subsequent decisions. *See*, *e.g.*, *Touche Ross & Co.* v. *Reddington*, 442 U.S. 560, 568 (1979) (rejection of a multi-factor analysis and declaration that "our task is limited solely to determining whether Congress intended to create the private right of action asserted"). The shift in focus was also explicitly recognied by Justice Stewart, speaking for the Court in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 1, 15-16 (1979):

> While some opinions of the Court have placed considerable emphasis upon the desirabilty of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, e.g., J. I. Case v. Borak, supra, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.

The Court's recent decisions denying liberal implication of private rights of action underscore the conclusion that major innovations in the rights and remedies available under federal law are policy decisions for Congress to pronounce. They are not to be resolved by the courts as a matter of federal common law.8/

8/ See also Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (no private right of action under the Federal Water Pollution Control Act); California v. Sierra Club, 451 U.S. 287 (1981) (no private right of action under the navigation obstruction provision of the Rivers and Harbors Act); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (no private damage action under the Davis-Bacon Act).

Indeed, the only Supreme Court decisions since Cannon that have upheld private rights of action can readily be distinguished on the basis of the unusual history of judicial construction. Thus, in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982), the Court looked at the judicial climate existing at the time the law was enacted and concluded

(footnote continued)

Finally, this conclusion is further confirmed by the decisions in Northwest Airlines, Inc., v. Transport Workers Union, 451 U.S. 77 (1981), and Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). Northwest Airlines considered whether an employer had a right of contribution against a union for liability incurred in a gender discrimination case under the Equal Pay Act. Justice Stevens, writing for a unanimous Court, found the Act created no such right of contribution and that none could be created as a matter of federal common law. Id., 451 U.S. at 95.

Similarly, Chief Justice Burger, writing for a unanimous Court in Texas Industries, found that the courts could create no right of contribution with respect to liability under the Sherman Act. Id., 451 U.S. at 646. The Court distinguished situations involving exclusively federal lawmaking authority, such as rights and obligations of the United States, interstate and international disputes, and admiralty cases. Absent such exclusively federal lawmaking authority, the federal courts make law only interstitially, not in the wholesale manner required by this legislation. Id. at 641. Thus, in

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(footnote continued)

that Congress would have assumed that a private remedy would be implied. And in Herman & MacLean v. Huddleston, 459 U.S. 375 (1983), the Court did no more than affirm the great number of cases, stretching over more than 35 years, finding a private right of action under section 10(b) of the Securities Exchange Act of 1934.

Texas Industries, the Court held that no authorization to declare a right of contribution was found in the Sherman Act. A right of contribution was held to be an issue of policy for Congress to resolve. Id. at 646.[9]

At one level, these decisions are not "constitutional;" they concern policies of statutory construction and judicial decision-making. Yet those policies are grounded in the constitutional structure of separation of powers. They call for an approach to statutory construction that curtails open-ended legislative delegations and avoids unguided judicial resolution of important questions of public policy. Where the fact or extent of congressional innovation is significantly uncertain, the courts should resolve the uncertainty against the change. Adherence to this approach encourages Congress to make the basic policy choices, as required by the Constitution, and to avoid the inappropriate delegation of legislative authority to the courts.

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[9] EPA [the government] has relied on Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) in support of its contention that the federal courts have wide latitude in declaring federal common law. But United States v. Standard Oil Co., Northwest Airlines, Inc. v. Transport Workers Union, and Texas Industries, Inc. v. Radcliff Materials, Inc. constitute a clear limitation on the scope of the Lincoln Mills doctrine in holding that the courts' latitude does not extend to policymaking. Moreover Lincoln Mills represented a clear attempt by the Court to avoid constitutional concerns as to federal question jurisdiction in the absence of governing federal law -- the converse of the situation represented in this case. Here, the constitutional concerns arise because the government has urged the need for a broad federal common law.

If Congress can successfully transfer its policymaking to the courts in an obvious effort to avoid hard choices, then it can evade the political accountability to the people that is essential for the legitimacy of legislative power. And if the federal courts, insulated from the winds of popular opinion, accept and exercise that legislative power, they will undermine their own role in the constitutional scheme as neutral arbiter.10/

B. EPA's Construction of Superfund Violates Constitutional Guarantees Against Retroactive and Disproportionate Punishment

1. The Contours of the Constitutional Prohibitions Against Retroactive and Disproportionate Punishment

The concept of retroactivity was anathema to the common law. This hostility to retroactive legislation was shared by the Framers and is reflected throughout the Constitution. Thus, article I, section 9 prohibits the national government from enacting any "Bill of Attainder or ex post facto Law." Article I, section 10 makes the same prohibitions applicable to the states. The *ex post facto* provisions, which bar retroactive application of penal legislation, have counterparts in the Due Process Clauses of the Fifth and Fourteenth Amendments,

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10/ See Powell, J., concurring in *United States v. Richardson*, 418 U.S. 166, 180, 188-97 (1974).

which have long been interpreted to forbid retroactive judicial enlargement of criminal laws. See, e.g., Bouie v. City of Columbia, 378 U.S. 347 (1964). The bill of attainder prohibition also bars legislative punishment of individuals or fixed groups for past actions or status. For non-punitive legislation, there is the article I, section 10 restraint against laws "impairing the Obligation of Contract" and the due process requirement that retroactive legislation be non-arbitrary. See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975). And as noted above, the constitutionally based hostility to retroactive legislation has given rise to a presumption against retroactivity and a corollary requirement that any intent to impose such liability be unequivocally expressed. See, e.g., Greene v. United States, 376 U.S. 149 (1964); Miller v. United States, 294 U.S. 435 (1935). Indeed, the Supreme Court has refused to apply retroactively certain of its own decisions interpreting federal civil liability statutes when the decision made a clear break with prior decisional law. E.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971).

The constitutional policy against retroactive legislation is therefore comprehensive, but it is not undifferentiated. It varies in intensity according to the character of the legislation at hand. Specifically, the degree of constitutional disfavor for retroactive legislation depends on its punitive character. At one extreme, the bill of attainder and ex post facto clauses erect an insurmountable barrier to retroactive penal legislation. Significantly, however, even non-penal legislation may be subjected to strict scrutiny where its punitive character nonetheless sufficiently appears. See, e.g., Cummings v. Missouri, 4 Wall. 277 (1867), and Ex Parte Garland, 4 Wall. 333 (1867) (both invalidating oath requirements of no past involvement with the Confederacy as preconditions for access to certain professions).11/ At the other extreme, legislation that is devoid of any punitive character is subject to much less demanding review.

Under Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975), on which EPA has relied, completely non-punitive retroactive legislation need only survive an arbitrary and irrational test. Even there, however, the Court made clear that the standard of rationality is more demanding than for prospective

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11/ United States v. Brown, 381 U.S. 437, 442, 447 (1965) ("[T]he Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers . . . . [It is] to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups."); United States v. Lovett, 328 U.S. 303 (1946). See also Wormuth, Legislative Disqualifications As Bills of Attainder, 4 Vand. L. Rev. 603 (1951); Note; Punishment: Its Meaning in Relation To Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez and Speiser Cases, 34 Ind. L. Rev. 231 (1959). Here since the group of all pre-enactment generators, while numerous, is nevertheless a fixed group of persons under EPA's interpretation, punishment constitutes a bill of attainder, even though the punishment follows only after trial or settlement.

legislation: "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Id. at 17. In the non-punitive context, the chief protection against retroactive legislation is the presumption against such application and the corollary requirement of unequivocally expressed legislative intent to impose liability on that basis.

2. Common-Law and Constitutional Requirements of Proportionality

United States v. Ward, 448 U.S. 242 (1980), lays down a twofold test for determining whether recoveries labeled "civil" are to be classified "civil" or "criminal" for constitutional purposes. The first test is how Congress labeled them. If Congress labeled them "criminal" or "punitive," then that is conclusive and the courts will make no further inquiry. The second test, an inquiry to determine if the statutory scheme is punitive either in purpose or effect, is made only where Congress has labeled the taking "civil." Id. at 248-49.

In the latter inquiry, one of the indicia of a de facto criminal statute is disproportionality. Id. at 249-50. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court listed, among other indicia of the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, the two tests which should be dispositive here:

(i) "whether it has historically been regarded as punishment," and (ii) "whether it appears excessive in relation to the alternate purpose assigned." Id. at 168-69.

Historically, the imposition of strict, joint and several liability on "responsible parties" for pre-enactment conduct in a civil action under section 107 of CERCLA is analogous to the forfeiture of all or part of a person's "chattels" because of past conduct that put the person "in the king's mercy." That is, retroactive imposition of such substantive liability to the government is the modern equivalent of an amercement, thus satisfying the first test. Three chapters of Magna Carta were devoted to the rule that amercements may not be excessive. An amercement was similar to a modern day fine. This ancient concept was based more on "blameworthiness" and "fault" than on common-law crimes or violations of statutes. Black's Law Dictionary defines an amercement as "a pecuniary penalty, in the nature of a fine, imposed upon a person for some fault or misconduct, he being in mercy of his offense."12/ Pollock and Maitland, in their more extensive description of amercements, state that:

> [An amercement] seems to have its origin in a heavy penalty. We can hardly doubt that at first the declaration that a man is in the king's or the lord's mercy implies that the king or lord may, if he pleases, take all his goods. Henry II's treasurer has told us this explicitly.

12/ Black's Law Dictionary 175 (5th ed. 1979).

Pollock and Maitland, The History of English Law 513 (2d ed. 1968). Pollock and Maitland also make clear that it was the taking of property, and not the label the king or the lord applied to the taking, that was the essence of an amercement, and Magna Carta's limitation applied notwithstanding the label. Thus, "[i]n Glanvill's day . . . men are always falling into the King's mercy in the course of civil actions. Id. at 515 n.4.

Magna Carta's requirement of proportionality in any such taking of property by the sovereign is not only encompassed in the concept of Due Process, but it is reinforced here by the Eighth Amendment's command that fines cannot be excessive. As both majority and dissenting opinions in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983), and the Court's earlier opinion in Weems v. United States, 217 U.S. 376 (1910), make clear, the Eighth Amendment's protection as to takings of property is at least as broad as the protections afforded Englishmen by the common law at the time of our Revolution. Indeed Weems cites Lord Devonshire's case as an example of an excessive fine. There, the House of Lords held that a fine of thirty thousand pounds for an assault and battery "was excessive and exorbitant, against Magna Carta, the common right of the subject and the law of the land." Thus, the historical antecedents to the constitutional requirement that the sanction be proportional to the act are clear.

In the past the king's taking bore labels such as amercements, ship money, forced loans or fines. Today our government's takings bear different titles, sometimes the innocuous labels of liability and reimbursement. But the essential punitive essence of the takings can be the same.

Against this background, it stands logic on its head to argue today that the government by merely labeling its taking civil can constitutionally take property for innocent prior conduct that could not be taken by fine or penalty because disproportionate to culpable prior conduct.

Because a section 107 award based on strict, joint and several liability can be so disproportionate to the conduct on which it is based, the second, "excessiveness" test of Kennedy v. Mendoza-Martinez is also satisfied.

If EPA argues that through prosecutorial discretion disproportional liability can be avoided through case-by-case application of joint and several strict liability, that would not save the statute. See Aptheker v. Secretary of State, 378 U.S. 500, 515-16 (1964), where the Court held that a clearly overbroad statute cannot be saved from unconstitutionality by trying on a case-by-case basis to separate constitutional and unconstitutional coverage.[13/]

[13/] Cf. A.B.A. Report on Proposed Criminal Code, 34 Bus. Law. 725, 741-742 (1979) ("This 'law of prosecutorial discretion', however, is a contradiction in terms and cannot be squared with

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3. Superfund's Punitive Character

As interpreted by the government, Superfund is retroactive legislation, and it falls somewhere in between the two extremes of constitutional scrutiny. On the one hand, the legislation is not explicitly criminal and therefore is not subject to automatic invalidation under article I, section 9 or the Eighth Amendment. On the other hand, the statute is not entirely non-punitive. Indeed, it has unequivocally punitive features. The harshness of EPA's construction of CERCLA undermines any suggestion that the statute is purely remedial. The imposition of strict, joint and several liability on a past, non-negligent, off-site generator without regard to the magnitude of his contribution to the dump site very easily could result in one company having to shoulder damages vastly disproportionate to its involvement. Though not strictly "criminal" in form, this type of enhanced liability is clearly punitive in substance.

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the concept of due process and other constitutional safeguards. One of the axioms underlying our constitutional system is that 'We live under the rule of law and not of men.' This presupposes, among other things, that what is or is not a crime will be spelled out clearly in advance so that men can voluntarily obey the law and so they will not commit crimes in ignorance of the law.")

Indeed, the legislative history of CERCLA, though meager, shows that at least one of its original draftsmen in the Justice Department recognized that the imposition of such liability would constitute punishment. In their separate statement on the reported Senate Bill, Senators Domenici, Bentsen and Baker observed:

> [The reported, but not enacted, Senate Bill] would create a new avenue for the U.S. Department of Justice to use its massive resources to sue the private sector. Large and small businesses would be treated alike; both would face the power of the Justice Department.
>
> This scenario is particularly perplexing in view of the statement reported in the press of a Justice Department employee who has been directly involved in the development of this legislation. He stated, "government is perfectly prepared to punish the innocent for the sins of the guilty." This position does not square with our sense of justice or with our view of the role of government. When we sought solutions to the problems of hazardous substance exposure, it was not our purpose to unleash a legion of Federal attorneys on the private sector.14/

This punitive quality of retroactive application of strict, joint and several liability is exacerbated by the treble damages provision embodied in section 107 of CERCLA. Sections 104, 106, and 107 of CERCLA 42 U.S.C. §§ 9604, 9606, and 9607, provide EPA with alternative strategies regarding cleanup of hazardous sites. Under section 104, EPA may undertake

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14/ Statement of Senators Dominici, Baker and Bentsen, S.Rep.No. 96-848, 96th Cong., 2nd Sess. 119-122 (1980).

cleanup, or contract with a state to do so. EPA may subsequently proceed under section 107 to attempt to recover the cleanup costs incurred from allegedly liable parties.

A second strategy is afforded by section 106 when EPA "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of hazardous substance from a facility." 42 U.S.C. § 9606(a). In that case, the Attorney General may commence an abatement action in a district court. But in addition to the abatement action, the government may also issue "such orders as may be necessary to protect public health and welfare and the environment." Id.

What orders and to whom? It appears from the provisions of section 107(c)(3) that an order under section 106 may be issued to "any person who is liable for a release." It also appears from the same provision that the order may direct such a person to "properly provide removal and remedial action"--that is, to undertake cleanup and related actions that might cost tens of millions of dollars. Id.

A statutory sanction for failure to comply with such an order is criminal in substance under the two-part test of United States v. Ward, 448 U.S. 242 (1980), described above. Section 107(c)(3) provides for imposition of "punitive damages" in three times the amount of the costs incurred by the Superfund would only compound the punishment. This liability is "in addition to" the Fund's compensatory recovery of its costs. Thus, there would be a four-fold imposition of costs against a liable person, only one quarter of which would purport to be compensatory.[15]

While section 107(c)(3) has not yet been invoked by the government in the current context, the punitive sanction is plainly relevant to the interpretation of the liability provisions of section 107(a). Liability under section 107(c) is predicated upon liability under section 107(a). No argument has been made, nor could one rationally be made, from either the face of the statute or its meager legislative history, that Congress intended section 107(c)(3) to apply only prospectively but section 107(a) to apply both prospectively and retroactively.

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[15] While the goverment's recovery of the compensatory damages might be "proportional," it could just as easily be disproportionate. Since liability under the government's interpretation is joint and several, there is no requirement that the amount recovered from an individual defendant be proportional to his contribution to the waste problem.

Moreover, the punitive sanctions are triggered by failure to comply with a cleanup order "without sufficient cause." Nowhere does Superfund define this phrase. Thus, a defendant may be deprived of any opportunity to test the validity of the cleanup order without incurring the risk of the severe punitive sanction because of the statute's vagueness. Cf. A. B. Small v. American Sugar Refining Co., 267 U.S. 233 (1925) (void for vagueness doctrine not limited to expressly criminal statutes); White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976), (an entitlements case) ("The requirements of due process include a determination of the issues according to articulated standards. The lack of such standards . . . deprives any hearing, whether before an agency or a court of its meaning and value . . . .)

4. Because of Superfund's Punitive Nature, Turner Elkhorn is Inapposite

EPA has relied primarily on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975), for the proposition that retrospective legislation imposing new liabilities based on past acts can survive constitutional scrutiny. But an analysis of Turner Elkhorn shows that the challenge to retroactivity resolved there presented radically different issues from those raised by the EPA's proposed retroactive application of Superfund.

First, the financial responsibility features of the Black Lung Act involved in Turner Elkhorn represented a clear, unequivocal, and deliberate congressional choice of financial alternatives. The specific issue was who would pay the costs of black lung compensation for miners not presently employed in the coal industry. The three choices were (1) to pay them from general Treasury revenues, (2) to spread the costs among all mining companies currently engaged in the industry, or (3) to allocate them to former employers of the disabled employees. There were competing equities involved in these alternatives, and Congress deliberately chose the last one.

The heart of the majority holding on this issue was that:

> [I]t is for Congress to choose. . . . We are unwilling to assess the wisdom of Congress' chosen scheme. . . . It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader

> cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. . . .

Id. at 18-19. Unlike the Black Lung Act, however, EPA's interpretation of CERCLA is not predicated on any evidence of a deliberate choice by Congress of the basis for determining financial responsibility for releases or threatened releases caused by pre-enactment activities. If sustained by the courts, the choice has in fact been made by EPA in the exercise of its prosecutorial discretion.

Second, Usery and Pension Benefit reflected Congress' use of the Commerce Power to adjust the benefits and burdens of economic life between private parties. Congress' role there was analogous to that of a neutral arbiter. Different, more stringent standards apply when the government takes property from the citizen for its own use to fund governmental operations. There the government cannot be viewed as a neutral arbiter. Rather it must be viewed as standing in the shoes of a long line of English Kings, against whose repeated arbitrary takings of their subjects property the safeguards of Magna Carta, the Petition of Right and the English Bill of Rights were forged -- safeguards carried into and broadened in the provisions of our Constitution and our Bill of Rights.

Third, the Turner Elkhorn holding was made in the context of a judicial analysis of the Due Process Clause that recognizes that legislation may adjust "the burdens and benefits of economic life" but that Congress may not act "in an arbitrary and irrational way." Id. at 15. As previously noted, the Court specifically recognized that this "arbitrary and irrational" test was more rigorous in the case of retrospective legislation:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the tests of due process, and the justifications for the latter may not suffice for the former. . . .

Id. at 16-17. The Court recognized that blameworthiness and deterrence, which justify prospective rules of liability, may not be a reasonable basis for imposing liability retroactively. See id. at 17-18.16/ EPA's repeated use of the term

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16/ The Court followed Turner Elkhorn recently in Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 52 U.S.L.W. 4810, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984). The due process challenge in that case related to financial obligations imposed under amendments of the Employee Retirement Income Security Act ("ERISA") in connection with employer withdrawals from multiemployer pension plans. These obligations were made applicable to withdrawals made in a five month period that was (i) prior to the enactment of the ERISA amendments, but (ii) while those amendments were under active consideration in the Congress. Id. at 2713-15.

Relying on the "arbitrary and irrational" test of Turner Elkhorn, the Court rejected the due process challenge and held that this explicit congressional determination of a limited five month retroactivity met the "arbitrary and irrational" test because it was justified by a "rational legislation purpose"--namely, discouraging withdrawals during the legislative process that "could have ultimately affected the stability of the plans themselves." Id. at 2718-19.

(footnote continued)

"responsible party," with its obvious overtone of blameworthiness, is additional evidence that its interpretation of CERCLA comes within this exception to Turner Elkhorn's general rule.

Fourth, the Court's application of the "arbitrary and irrational" test in Turner Elkhorn was made in a context sharply different from that of CERCLA.17/ In Turner Elkhorn there was a clear causal link between mine employment and black lung disease and a direct one-to-one relationship between economic benefit derived and compensation due. The statutes involved in Turner Elkhorn and Pension Benefit in no way offended the underlying constitutional concept of proportionality. Indeed, they implemented it. There was neither punitive intent nor effect in the retroactive provisions in Usery and Pension Benefit. Here, by contrast, the government asserts a retroactive liability that is transparently haphazard in application and grossly unfair in amount. The full thrust of EPA's

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The Pension Benefit Guaranty case, therefore, like Turner Elkhorn, holds no more than that the courts will defer to a choice made by Congress that is both explicit and rational. By contrast, the retroactive application of Superfund urged by the government (i) was not explicitly made by the Congress, (ii) is unlimited in time, and (iii) can lead to arbitrary and irrational results.

17/ See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 38 (1976) (Powell, J., concurring in the result on the grounds that there had not been a "factual showing" of irrationality to overcome a "strong presumption of constitionality.")

interpretation of CERCLA is that an off-site generator of waste may be liable:

> (i) in huge amounts;
>
> (ii) on the basis of only the most marginal connection with the particular release or threatened release;
>
> (iii) even in the absence of ordinary causation in fact;
>
> (iv) without rights of contribution against others who as a practical matter may have been much more involved; and
>
> (v) on the basis of conduct that was without fault and not abnormally dangerous.

Fifth, the test of Turner Elkhorn is in any event inapplicable to quasi-punitive legislation such as CERCLA. The statutes involved in Turner Elkhorn and Pension Benefit were completely devoid of punitive aspects. Therefore, they did not implicate the strong constitutional policy against retroactive punishment. The bill of attainder and *ex post facto* clauses and the heightened scrutiny of retroactive penal legislation under the due process clause were irrelevant to that decision. Since the legislation at issue in Turner Elkhorn was simply and directly compensatory in nature and in Pension Benefit did not enlarge the scope of preexisting obligations, there was no need to undertake the functional analysis indicated in United States v. Ward and Kennedy v.

Mendoza-Martinez, nor was there any occasion to assess the implications of those decisions for laws combining regulatory and punitive characteristics.

But Superfund is such a law. Although nominally compensatory in nature, it contains distinctively punitive aspects and applications. The constitutional policy against retroactive punishment is therefore brought into play. While it may be true that Superfund does not warrant automatic invalidation as retroactive penal legislation under the ex post facto and bill of attainder clauses, it is equally true that it is not entitled to the same relaxed standard of review invoked in Turner Elkhorn. The opinion in that case states the constitutional test for retroactive adjustment of compensatory obligations It does not address the standard for review of retroactive punishments. Nor does it suggest that retroactive punishment is unobjectionable merely because it is non-penal. As the Turner Elkhorn Court no doubt would have recognized had the situation been before it, that conclusion would contradict the broad constitutional policy against retroactive punishment of whatever sort and undermine the Court's own precedents. See, e.g., Cummings v. Missouri, 4 Wall. 277 (1867), and Ex Parte Garland, 4 Wall. 333 (1867);

United States v. *Brown*, 381 U.S. 437 (1965); *United States* v. *Lovett*, 328 U.S. 303 (1946).

Finally, EPA has offered no limiting principles to the scope of its retroactivity argument. Under it, when carried to its logical extreme, the government could confiscate a persons entire property so long as it has a rational purpose for doing so. Under such a regime, presumably, the ex-Confederates who were unconstitutionally disbarred from the practice of law and the ministry in *Cummings* and *Garland* could constitutionally have been stripped of all real and personal property to pay for the debts of the Civil War. And presumably, private property, which now can be taken for public use only with payment of just compensation, could in the future be taken without compensation because the public purpose would always provide a rational basis.

CONCLUSION

Sound policy suggests that these constitutional infirmities be avoided by limiting the statute's backward reach. Otherwise, there is the necessity of confronting the grave constitutional problems raised by EPA's claim of retroactive application. In *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), Chief Justice Hughes observed that:

> When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Superfund can be construed to avoid the constitutional dilemma. The reasonable alternative construction suggested would fulfill Congress' broad remedial purpose without offending constitutional separation of powers, due process, and other constitutional safeguards.

It may take years, however, for the questions discussed to reach the Supreme Court and be definitively resolved by it. If the Court ultimately construes the statute to avoid the constitutional issues, then the threat of unjust disproportionate strict, joint and several liability now threatening many manufacturers and the entire casualty insurance industry with potential bankruptcy will have been averted. If on the other hand, the Court were to ratify EPA's interpretation and hold it constitutional, the immediate effects could be devastating to many innocent generators and the obviously innocent insurance industry. Also the precedent would essentially strip away most of the protections for private property carefully forged over the years by our English ancestors through the evolution of the common law and written into our Constitution and its Bill of Rights by our founding fathers. The adverse consequences for our personal liberty, and our economy, could be devastating.

For these reasons, adoption of an amendment during the impending consideration of S.51 making clear that Congress does not intend to have strict, joint and several federal substantive liabilty imposed retroactively would definitively resolve all these problems.

George C. Freeman, Jr.
Richmond, Virginia
June 4, 1985

APPENDIX B

THE CONSTITUTIONALITY OF CITIZEN SUIT PROVISIONS AUTHORIZING RECOVERY OF CIVIL PENALTIES

Section 138 of S.51 would authorize recovery of civil penalties in a private citizen enforcement suit. This provision raises serious constitutional questions.[1]

Actions by parties other than the United States for imposition of civil penalties are subject to constitutional challenge:

-- as a delegation of governmental power to private persons; and

-- as a violation of separation of powers principles by infringement on Executive Branch authority and discretion with respect to law enforcement.

The constitutionality of provisions such as § 138 is governed by three decisions of the United States Supreme Court:

-- Buckley v. Valeo, 424 U.S. 1 (1976), holding that delegation of law enforcement authority to a body, the Federal Elections Commission, some of whose members were appointed by Congressional officers, violated separation of powers principles and in particular the Appointments Clause, Article II, § 2, clause 2;

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[1] Similar provisions in the Clean Water Act and RCRA allowing recovery of civil penalties in private citizen enforcement actions are equally suspect.

-- Carter v. Carter Coal Co., 298 U.S. 238 (1936), holding that delegation of governmental regulatory authority to a private industry body was unconstitutional; and

-- Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), holding that delegation to a religious body of a veto power over location of liquor licensees violated the Establishment Clause of the First Amendment.

The teaching of the Carter Coal and Larkin v. Grendel's Den cases is that certain powers which may properly be exercised by governmental bodies cannot be delegated to private parties. The specific constitutional provisions at issue in those cases were different than those involved here. But the underlying principle is the same -- some powers are governmental in nature and can be exercised only by persons accountable to the electorate.

This principle is at the heart of our constitutional system. The premise is that the people have consented to the exercise of governmental power over their lives only by persons who have been chosen by the people and are removable by them. L. Tribe, American Constitutional Law, (1978) § 5-17, 284-85.

The teaching of Buckley v. Valeo is that even the power to bring a civil enforcement action is one which, absent a situation where private rights are being vindicated, cannot be exercised by one not appointed in the manner contemplated by Article II. The holding in Buckley v. Valeo is reenforced by the line of separation of powers principles decisions under which courts have consistently declined to review the exercise of prosecutorial discretion except in the most extraordinary circumstances. K. Davis, Administrative Law Treatise (2d Ed. 1979 and Supp. 1982) §§ 9.1-9.22, 215-304.

The particular constitutional provision implicated in Buckley v. Valeo was the Appointments Clause. But if Congress cannot delegate a power to seek civil injunctive relief to enforce a Federal enactment, even to its appointees holding a governmental position, it is a fortiori that it cannot delegate to private persons the power to impose punishment of severe monetary penalties to enforce such an enactment.

Congress' attempt to breach this principle of separation of powers through a citizens suit provision would plainly run afoul of:

-- the President's role under Article II, § 1 as the trustee of the national government's Executive power, and

-- his charge in Article II, § 3 to "take Care that the Laws be faithfully executed . . . ," and

-- his "power to grant Reprieves and Pardons for Offenses against the United States," Article II, § 1.

This issue is not governed by United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). That decision sustained an informer ("qui tam") action to recover monetary compensation for harm sustained by the Government in its proprietary capacity and caused by a civil wrong, fraud. Marcus v. Hess has no application where, as here, the purposes of the civil penalties are not compensatory and corrective but retributive and deterrent.

Neither is this issue governed by the line of decisions exemplified by J.I. Case & Co. v. Borak, 377 U.S. 426 (1963), which govern private rights of action for breach of an obligation arising under a Federal statute. Those decisions involve actions for monetary or equitable relief to redress harm sustained by private persons as a consequence of infringement of their rights arising under Federal law. Such private rights of action have an enforcement aspect, but that aspect is incidental rather than central. An action for civil penalties on the other hand serves only a law enforcement function. The plaintiff in such a civil penalty action is thus not like a citizen protecting his homestead, he is, instead, more analogous to a bounty hunter.

Civil penalty provisions have become a typical feature of Federal regulatory legislation, partly because they can be imposed without proof of culpability, partly because proceedings to enforce them may not be subject to the procedural protections of the Fifth and Sixth Amendments, and partly because of the limited utility of conventional criminal fines for offenses by corporate bodies. The penalty provisions, in other words, are an element of the enforcement scheme of the Act, serving as a substitute for criminal sanctions and unrelated to whether monetary harm is sustained by the Government or by private persons and the amount of any such harm.

The importance of prosecutorial discretion as to whether such penalties should be sought is obvious. It is no answer to say that the court in the civil penalty proceeding can exercise the discretion normally expected of public enforcement officials. The very institution and maintenance of a proceeding is a severe burden on a defendant. It is in the first instance -- and regardless of ultimate outcome -- damaging to the reputation of a defendant who may be generally law-abiding in environmental and other contexts. It is a source of stress and an occasion for diversion of management resources of time and energy. The costs of defense may be quite large. The pressure to settle arising out of these factors may be very great. These are considerations that a politically accountable prosecutor normally should take into account. Where he does not he risks an adverse political reaction for himself or his superiors through elections and the checks and balances in our government. These factors may be ignored by individuals or private organizations engaged in the business of litigation, who are free to operate outside the constraints of the political process.

APPENDIX C

ALTERNATIVE APPROACHES

Support for the citizen suit and private cause of action provisions in the Superfund context is in part a result of the continuing EPA campaign to insulate its processes from outside influence.1/ Correction of potential EPA abuses of a public works program desperately needing national leadership and direction lies not in the superimposition of chaos-creating citizen enforcement lawsuits on top of the already existing private causes of action under Superfund. Rather, what is needed is the assurance of the usual protections provided the citizens by the Administrative Procedure Act (APA). The APA insures meaningful but structured public participation in administrative processes without the unnecessary interference in proper agency activities which inevitably flow from citizen suits and private causes of action.

A. Administrative Reform

There are a number of ways, consistent with principles of administrative law and fundamental fairness, to overcome the provisions of section 133 which unduly restrict judicial review

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1/ Office of Technology Assessment, Superfund Strategy, Chapter 8 (April 1985).

to a narrow administrative record. First and probably most beneficial, the district court could engage in de novo review of the remedial selection process and the performance of the remedial action. Second, and not quite as preferable as de novo review, most of the important protections of individual rights could be preserved by the application of process, issuance of an administrative order, and the performance of the remedy.

This latter approach for reform of the administrative process under Superfund should be familiar to those of you on this Committee who worked so long and hard on the Regulatory Reform legislation, S.1080. Instead of codifying EPA's strained construction of the present Superfund law to preclude the normal process of judicial review over Agency actions under the APA, as set forth in the Environment Committee's version of S.51, the Senate should affirm the applicability of that Act's important citizen protections to Agency decisions taken under the Superfund program. Moreover, it should utilize the opportunity to bypass the otherwise "sure death" awaiting in the House for regulatory reform by selectively incorporating key S.1080 amendments to the APA in this bill. Then, EPA's issuance of administrative orders under sections 104 or 106 would be issued under the procedures and protections such as those set forth in the APA as amended. Thus the amended provisions for formal adjudications would be applicable.2/ If abbreviated

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2/ 5 U.S.C. §§ 554, 556, 557, as they would be amended following the basic thrust of S.1080.

procedures become necessary, in emergency spill situations for example, the full hearing which the APA guarantees can of course be deferred until after needed action is taken. But a reasonable opportunity, in light of the circumstances, must exist for affected parties to be heard. The Constitution requires that "some kind of hearing" be provided, in a meaningful time and in a meaningful manner, before action is taken or as soon as possible thereafter -- not long after the fact as EPA would prefer.

It would be a major step forward if S.1080's "anti-evasion" provision were also written into the APA and made applicable to EPA's administration of the Superfund Act. Most of the Agency's important decisions affecting the rights of citizens and PRPs are made in a daunting series of handbooks, manuals and informal guidance. In fact, in some instances, critical regulatory provisions have effectively been "repealed" by informal guidance that has not been subjected to notice and comment. Yet, truly legislative or substantive regulations or important policy changes have never been intended to be within the APA's interpretative rule exception, which allows internal office procedures to be issued without public notice or comment. As this Committee wrote in 1981, there is abuse in "use of self-styled 'guidance documents' to promulgate de facto rules . . . without following public notice and comment procedures . . . Such de facto rule making not only blocks private citizens from effectively participating in this form of law making but also prevents agencies from benefiting from the information persons outside the agency can contribute."3/ EPA clearly should be making its policies for this important public program in public rulemaking, not through off-the-record agency handbooks and memoranda as it now proceeds.

Just as fundamental in light of EPA's attempts in legislative, regulatory and litigation arenas to avoid judicial oversight is inclusion of the Bumpers Amendment regarding the scope of judicial review, preferably in the version that this Committee reported it in S.1080. The Bumpers Amendment can defeat any EPA attempt to stack the deck against the citizen through the Agency's manufacture of self-serving presumptions or "interpretations" in their Superfund regulations or orders to which judges may feel compelled to defer. In this Committee's own words:

> When a citizen challenges an agency's rule or order in the courts, the odds should not be stacked against him by judicial presumptions in favor of the agency. The judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighting them against the citizen. We intend this amendment to reestablish an equal balance.4/

3/ S.Rep.No. 97-284, 97th Cong., 1st Ses. (1981).

4/ S.Rep.No. 284, 97th Cong., 1st Sess. 170 (1981).

It is also appropriate that this Committee insure that EPA is unable to exclude any material from its decision-making files which bear on its activities or to rely on material which was not placed in its public files in time to afford an adequate opportunity for public comment during the period for public participation in the Agency's decision-making process. Again, S.1080, in its proposed amendments to Section 553 of the APA, can serve as a model for EPA agency decision-making procedures under Superfund. The confusing language presently included in the "pre-enforcement review" section of S.51 should be replaced with the more carefully drafted and well understood provisions of S.1080.5/

I believe that inclusion of S.1080's protections of the citizen against abuses of the administrative process will make a citizen suit provision unnecessary. The normal process of judicial review of final agency rules and orders under the revised standard of the Bumpers Amendment should curb excesses while preserving an appropriate level of administrative flexibility. If this Committee decides to go beyond these reforms, however, and to include a citizen suit provision, it should make the citizen suit it designs the exclusive such provision for the area covered by Superfund.

5/ Even if this Committee decides not to require EPA to conform to the formal adjudication processes of the APA, it should mandate those minimal notice of comment provisions set forth in S.1080's amendments to Section 553 of the APA in order to protect citizens against self-interested agency manipulation of its agency administrative records which will be subject to judicial review.

B. Citizen Suit Reform

In the past, citizen suit provisions included in various environmental regulatory statutes have slipped through Congress without the needed examinations by the House and Senate Judiciary Committees. As a result, the provisions overlap badly and create confusion. One notable example is section 7002 of the Resource Conservation and Recovery Act (RCRA). This section was expanded by the amendments to RCRA enacted last year. In an attempt to alleviate the confusion and overlap in the revised citizen suit section, the House-Senate Conference on RCRA included a number of limitations, which reference the Superfund Act, not found in either the previous House or Senate versions of the citizen suit provision. A basic problem is that many releases of hazardous substances which could be the subject of the RCRA provision might also be releases for which EPA or others might be responsible under Superfund. If you decide to provide for a Superfund citizen suit provision, I urge you also to amend RCRA to limit its citizen suit provision to RCRA facilities. Otherwise, duplication and overlap will be worsened, not bettered, by addition of a Superfund citizen suit provison. The limitations on citizen suits contained in the RCRA provision should, of course, also be part of any Superfund citizen suit provision.

In light of the grave constitutional problems surrounding a broad citizen suit provision and in order to avoid the serious problems described above, it may be best to formulate the requirements for a model citizen suit provision. The elements of such a model provision should include:

1) Applicability Limited to Statutes with Clear, Objective Requirements - citizen suits are appropriate only where the statute imposes a clear, objective requirements either upon the regulatee or the Administrator, such as the effluent limitations in the Clean Water Act or the Administrator's duty to promulgate regulations within a specific amount of time, which is found in RCRA. Other statutes which rely on administrative discretion, such as Superfund, are not appropriate candidates for citizen suit provisions.

2) Injury In Fact - in order to avoid the delegation of executive power to a roving private citizen group, it is necessary to circumscribe the class of citizens who may bring such actions. A strict "injury in fact" requirement would limit the plaintiffs to a class which has a demonstrable interest in the outcome of the litigation.

3) Avoid Interference With Ongoing Enforcement Or Administrative Activities - in order to avoid the disturbance of lawful federal or state administrative action or enforcement, citizens suit provisions should include a series of affirmative defenses which are based on the existence of certain program-specific administrative actions or the pendency of enforcement orders.

4) Single Proceeding By Citizen Or Government - the courts and members of the regulated community should only be subjected to a single proceeding by either the citizen or the government for the same injury. This is necessary both to preserve judicial economy and to enhance the prospects of settlement. Also, if the earlier action is subject to virtually unrestricted collateral attack, industry will be harmed by lack of certainty and disruption of its day-to-day operations. To achieve this end, there must be a reciprocal intervention of right by the government in a citizen suit and by a citizen in the government's enforcement action. This will bring all of the interested parties before the court in a single action. If either the government or the citizen chooses not to exercise this right of intervention, the government and the citizen should be considered in privity with one another so that the government will be collaterally estopped from challenging an issue of fact or law decided or settled in a citizen suit, and vice versa.

The American Insurance Association (AIA) has proposed a model citizen suit provision for Superfund. Despite my misgivings about the constitutionality of any citizen suit provision, I commend the AIA proposal to you as a thoughtful model provision with many improvements over the hastily considered and internally inconsistent provisions found in S.51, various other pending bills, and indeed in other environmental statutes under present law, such as RCRA.

C. Apportionment of Liability

EPA-initiated multi-tiered litigation actually produces slower settlements and cleanup than what could be obtained under a reformed system where at least three items would be clearly ascertainable prior to any enforcement proceedings: (1) whether or not a person is liable, (2) the extent of individual liability, and (3) the obligation of the Superfund to pick up the shares of missing or bankrupt generators. The settling parties in Chem Dyne all agree that the establishment of a fair allocation scheme was the sine qua non for the commencement of serious settlement discussions. Thus, when S.51 comes to the floor, I urge you to amend the act to provide a means of estimating all three variables necessary for a fair allocation within reasonable ranges, however rough that may have to be in certain circumstances, before the initiation of any suit. This contrasts with EPA's present two or three trial scenario, where EPA sues some generators for total cleanup, those generators in turn sue other generators for contribution, and perhaps EPA and or some generators sue insurance companies, before all these matters are sorted out.

Experience and common sense tell us that a person is more likely to settle if he knows (1) he is liable, (2) feels that he was fairly given prior notice that certain activities expose him to the risk of such liability, and (3) he knows approximately his maximum exposure. In many instances that exposure may actually be less than the trial costs presently confronting him in EPA's present multi-litigation [illegible] On the other hand, where as here (1) the law is uncertain (2) the person at risk justifiably believes the law is unfair and coercive, because he was not given prior notice or the opportunity to avoid its incurrence, and (3) because of the threat of joint and several liability, he may be held disproportionately liable for actions of others over whom he had no control and with whom he did not conspire or act in concert, he normally will not settle where potentially large sums are at stake. This is often the case at many multi-generator sites. It is no wonder that many believe they have no alternative but to fight. This in turn strains the litigation resources of EPA and Justice. Thus, EPA's multi-litigation system tends to bog itself down, as EPA's own statistics show, despite EPA's recent flurry of settlements which it hastily made in the shadow of such possible amendments.

Adoption of such amendments would also reduce the burden Superfund is now imposing on the courts in yet another way. Many of the issues on which EPA has presently tenuously prevailed in the district courts are yet to be tested at appellate levels. Definitive resolution of these questions by the Supreme Court may take the next five years of life Congress is about to give the Act. And it is possible that in that interval the Court may well find some of the present Act's most controversial features, notably retroactive imposition of disproportionate joint and several liability, are unconstitutional, for the reasons given in Appendix A. Thus, amendments along the line suggested above would not only make Superfund fairer, it would cut short those years of future appeals and would remove the cloud of unconstitutionality now over the present act.

I also urge inclusion of express statutory criteria for apportionment, as Congressman (now Senator) Gore did in 1980. Merely stating that contribution or apportionment "shall be governed by Federal law," as EPA and some industry groups have advised, simply encourages continued litigation over those criteria into the indefinite future. Congress should face up to these tough liability issues and resolve them, even if EPA and other interested parties prefer to avoid responsibility and to delegate their resolution to the courts. The country needs to end this needless litigation and get on with the cleanup.

D. Reform of the Liability Regime

The time has come for Congress to face up to the realities of the Superfund litigation/insurability crisis and to put fairness back to the fundamental common law principle that litigation should be prospective only. Whatever each of you individually may or may not have intended in 1980 when Congress enacted Superfund, you should this year purge the Act of the unfairness of retroactive strict, joint and several liability. In particular, I urge you to amend it to unequivocally bar any retroactive imposition of federally-created strict, joint and several liability and to legislatively mandate fair apportionment in place of joint and several liability. It is not enough for our new EPA Administrator to promise us now that he will show due discretion in the future in the use of his vast prosecutorial powers. Good promises are not enough. No one wants to live or invest under a regime of prosecutorial discretion, however benign the prosecutor. We want to live under the rule of law and not of men.

In strict, joint and several liability we have given the EPA Administrator a pistol and retroactivity permits him to point it at the head of the innocent as well as the guilty. But to force cleanup or reimbursement using litigation, or the threat of litigation, from past generators or their insurers who did nothing illegal or actionable amounts to nothing less than extortion. For our government to act in this fashion is counter to our longstanding traditions of prior notice and individual responsibility. It is an unprincipled, coercive, system. For if the government today in the name of protecting the environment can take all of a man's property for past innocent, legal, non-actionable acts, then it can do so tomorrow for another popular cause. Yet the basic reason for our Constitution and its Bill of Rights is to protect our life, liberty and property from such arbitrary action.

When S.51 comes to the floor I urge you to amend the act to outlaw any further threat of retroactive imposition of new liability. The time has come to show investors in this country and abroad that Congress is going back to the tried and true common law tradition that we will not again alter the rules of the game retroactively. People can continue to work, invest and insure in this country confident that Congress has recognized the perils to our economic system posed by retroactive imposition of new liabilities and that we will not risk them again in this or other acts.

Thus, both principle and practicality unite to compel adoption of such an amendment. But such an amendment, particularly if coupled with others that would substitute mandatory apportionment, first by EPA to expedite settlement and then the courts if claims come to trial, for joint and several liability, would also expedite EPA cleanup and encourage a person who is legally responsible for cleanup to do so or settle with EPA for his fair share of the costs.

The principal argument made by EPA for the retention of retroactive, strict, joint and several liability is that it makes the settlement of EPA claims for cleanup easier. At best, the data in support of this argument are inconclusive. And the argument itself runs contrary to our instinctual response to government oppression. But even if EPA's argument were substantiated, is Congress really willing to let convenience for the EPA be obtained at the high price of such fundamental unfairness to our citizens?

Apart from fairness considerations, however, EPA has not satisfied the burden of proving that strict, joint and several liability actually facilitates cleanup. At present, five years after the enactment of Superfund, there has been relatively little cleanup at the sites on the EPA National Priorities List (NPL). About one-third of the NPL sites have single owner/generators. There joint and several liability is immaterial and state statutory or common law imposes cleanup obligations that antedated Superfund. The critical sites are the other two-thirds where multiple generators are involved.

It is the multiple generator sites where the concepts of joint and several liability and retroactivity seriously complicate the problem of resolving each party's obligations. EPA's policy has been to pick out some but not all of the past generators and to impose on them all or most of the cleanup responsibilities. EPA calls all those it can in any way identify with a site "responsible parties." EPA uses the term if it implied some misconduct on the part of those labeled "responsible." But EPA steadfastly denies that it must prove that they did something illegal or actionable when they disposed of their wastes or, indeed, that their particular wastes actually imperil or threaten the public. Thus, in reality those chosen by EPA are "responsible" only in the sense that they must pay.

EPA's position has been that fairness is none of its business. Whether the persons it selects pay more or less than their respective fair shares is their concern, not EPA's. If they have an implied right under Superfund of contribution from others, problematical in light of recent Supreme Court decisions, these persons may assert such rights in a separate, subsequent court action. But EPA maintains that such issues should not be permitted to complicate EPA lawsuits or settlement negotiations. Viewed objectively, EPA's position is that the convenience of the executive branch of the government -- EPA and the Justice Department -- outweighs considerations of judicial economy, the imposition of excessive legal and consulting costs on our citizens, and resulting threat to new investments or the continuing availability of insurance in this country.

APPENDIX D

EPA'S EXERCISE OF PROSECUTORIAL DISCRETION UNDER SUPERFUND: SEVEN CASE STUDIES

1.

INDUSTRIAL PARK DEVELOPMENT

Industrial Park Development Co. v. EPA, 22 Env't Rep. Cas. 1593 (E.D. Pa. March 21, 1985), presents a good example of the discretionary behavior which EPA seeks to have insulated by section 133. In that case, a full 16 months after EPA's initial inspection of the site, an onscene coordinator ("OSC") issued a § 106 administrative order to the lessor of a site requiring virtually immediate performance of site stabilization, container and soil sampling, and waste removal. There was no judicial review either prior to issuance of the unilateral order or within a reasonable time thereafter. Id. at 1598. The lessor performed the site stabilization and container sampling within approximately two weeks at a cost of $133,000. Three weeks thereafter, the lessor submitted a plan for waste removal and more extensive soil sampling. The EPA official disapproved the plan and ordered necessary revisions by the next day. Id. at 1596.

The lessor complied with this one day deadline, but the EPA official was unmoved. After five additional days in which the lessor attempted to revise its plan in conformance with the shifting and ever more expansive requests of the EPA official, the official finally disapproved the plan primarily because the lessor had requested extensions of between 2 and 4 days for several activities. Id. Instead, the EPA official hired its own contractor. Unlike the lessor, however, the EPA contractor was not required to complete his activity within any particular time schedule and did not have available any approved storage facilities for the removed materials. Id. at 1599. Thus, EPA's actions might well take much longer than the lessor's. Id. Faced with the EPA official's continual, unilateral modifications of the plan and his decision to proceed on a potentially more time-consuming course and recognizing that the lessor's failure to comply with each of EPA's requests could expose him to the threat of punitive, treble damages, the court was provoked to conclude:

> [EPA's action] suggests an arrogance of power that is bureaucracy at its worst; the Government's assertion that its conduct is completely insulated from court review initiated by those harmed thereby compounds the problem. Id.

The Government does not wish to have its activities exposed to the factfinding process engaged in by the judge in this case. If section 133 of S. 51 is enacted, there will be no checks and balances to inhibit the frequent repetition of such administrative behavior.

ZELLWOOD GROUNDWATER CONTAMINATION SITE

The site was ranked on the original Superfund site list solely because of the finding of 130 parts per billion of arsenic at one location along a railroad right-of-way on property used by Drum Service Company of Florida. Drum Service Company protested the ranking claiming the arsenic was almost certainly residual from years of railroad spraying right-of-way with arsenic-based herbicides for weed control. The railroad has admitted this activity. Nevertheless, the site was not removed, although the original site name (Drum Service Company) was changed to the present to reflect the fact that parties other than Drum Service Company might be responsible for contamination.

Drum Service Company was incorporated and began operation in 1963. It is now the largest steel drum reconditioning plant in Florida, although it is a small business, with sales of approximately $5,000,000. The company employs approximately 100 people; most of the company's workers are members of various minority groups.

In the early 1970s state and local environmental authorities advised that the company's surface discharge of partially treated industrial wastewater was no longer acceptable. A professional engineer was retained and an application for a Construction Permit for a wastewater treatment system was submitted to the Florida Department of Environmental Regulation. The system contemplated a final "evaporation/percolation" pond for ultimate disposal of treated wastewater, with all wastewater being retained on site with no surface discharge. Note on the enclosed copy of a portion of the application the information furnished in Section "D" covering "discharge into groundwater," especially item 1,e: "Ultimate disposal of surface or subsurface runoff" where the Engineer answered: "percolation to groundwater."

This application was approved and a Construction Permit to build the system was issued July 14, 1972. Over the subsequent ten years techniques of further clarifying and recycling the wastewater in the plant were developed, and the surface impoundment area of the evaporation/percolation ponds were removed by the company in August, 1981. The removal action was completely voluntary and not under threat of any state or local action.

Following listing as a Superfund site, the area has been studied on three separate occasions by the EPA:

1. During August-September, 1982, and EPA contractor, Ecology and Environment, Inc., Field Investigation Team conducted an investigation of the area, including the placement of six groundwater monitoring wells.

2. During December, 1981, a team from the Environmental Services Division, U.S. EPA conducted an extensive investigation of the area. Twenty-eight samples were taken and tested for the full range of EPA "primary pollutants." Included in the testing were three local drinking water wells which were found to be uncontaminated.

3. In 1984, the new EPA contractor - NUS Corporation - began a "Remedial Investigation/Feasibility Study" investigation, which is taking place at this time, and which may not be concluded before the end of 1985. Seventeen additional wells will be installed in this study, and a total of 148 samples taken.

Cost of the first two investigations are not available, but the Work Plan for the NUS RI/FS indicates a cost of $510,070 plus laboratory sampling costs (which field personnel have estimated at $150,000 to $200,000).

Thus, it appears that at the end of the NUS investigation between $750,000 and $1,000,000 will have been spent on investigations at the site. The only response action requested by EPA of any party at the site was the removal of some abandoned rusty empty drums and junk cars on a neighboring property; this was accomplished in August, 1983.

1. Drum Service Company operated in complete compliance with all federal, state, local and environmental laws. It has never been charged with violation of environmental laws.

2. Drum Service Company constructed a wastewater system having unlined surface impoundments with the complete approval of state and local environmental authorities.

3. As a result of this approved, permitted activity, there may be some contamination of the surficial aquifer in the area of the former evaporation/percolation ponds.

4. Regardless of whether any contamination is ultimately found, the investigation response costs of the EPA are approaching $1,000,000. All such sums are potentially recoverable from a "responsible party" subject to only very limited defenses.

5. Such amounts clearly exceed the ability of a small business to pay. This is especially true when the firm is currently spending large sums to comply with other environmental laws (VOC control under the Clean Water Act; waste management under the Resource Conservation and Recovery Act; the new underground tank management rules, etc.)

6. Cost recovery action of these sums by the EPA will result in the bankruptcy of the firm and loss of employment for 100 workers.

3.

WESTERN SAND AND GRAVEL

Following passage of the Resource Conservation and Recovery Act of 1976, many industries became more concerned about proper disposal of their wastes. Since regulations implementing the Act were not published by EPA until 1980, industry had essentially nowhere to turn for advice except state and local environmental authorities.

In Rhode Island, New England Container Company and several other industrial companies asked officials of the Rhode Island Department of Environmental Management where they should take waste (which would be later called hazardous wastes under the 1980 RECRA regulations). State officials advised the landfill run by Western Sand and Gravel as the preferred destination. New England Container and other companies complied with the state's recommendation.

Groundwater contamination was subsequently discovered at the Western Sand and Gravel landfill. The site is now a Superfund site and Western Sand and Gravel is out of business. EPA and state officials have spent approximately $1,000,000 in engineering studies at the site and have estimated clean-up costs of millions of dollars.

EPA and state officials have initiated cost recovery negotiations with New England Container and other companies who used the site at state direction. Many, like New England Container, are small businesses. These companies have not been charged with any violation of environmental regulations or any standard of negligence.

4.

CONSERVATION CHEMICAL

The current case of U.S. v. Conservation Chemical Co. (Kansas City, MO) et. al. is an excellent example of how the application of the doctrine of "joint and several liability" has needlessly delayed the start of cleanup and added significantly to the costs of any final settlement.

Conservation Chemical, formed in the 1960s, recognized the potential economic returns from treating industrial wastes from various industries of a centrally located facility. Not only would centralized treatment be more economical, but it would also result in less discharge to the environment.

Thus, in the early 1960's, Conservation Chemical became one of the pioneers in the field of industrial waste treatment, receiving favorable national publicity as a fully permitted waste facility.

Yet, like many such facilities nationwide, growing environmental concern over waste disposal focused attention on the adequacy of practices which had recently been considered state of the art. In early 1980, EPA studies demonstrated concentrations of contamination in the groundwater adjacent to the Conservation Chemical site exceeded drinking water standards. On this basis, the federal government decided to initiate action.

From 1980-1982 Conservation Chemical shut down its operation and totally removed hazardous wastes from tanks left on the site. While this action mitigated the potential for discharge from the site, the EPA raised additional concerns over the potential harm to the environment from residual contamination. But Conservation Chemical was by this time out of business. Thus, in late 1982, the U.S. Government singled out four "deep-pocket" generators who had previously used the site (FMC, Armco, IBM and AT&T) from among 300 other generators and filed suit against them under the doctrine of "joint and several" liability. Conservation Chemical was also included in the suit. In its complaint, the government asked for remediation of a condition which it said may present an imminent and substantial endangerment to public health as a result of materials disposed of at the site.

The four defendants, now drawn into litigation, filed a motion to dismiss the complaint against them and sought to reach out of court settlement with the government. But in early 1984, the motion to dismiss the case was denied. The defendants in turn sued 175 other generators as well as 16 insurers and several government agencies who had used the site. In addition, the defendants voluntarily commenced their own remdial site investigation and feasibility study at a cost of $2MM. The government had indicated it could not complete the study within the time frame set by the court. Legal fees expended by the four parties during the 1983-84 period are estimated to be at least $6MM. In addition, 3rd parties have spent $3MM-$4MM on legal costs.

It is important to note that the four parties named by the U.S. Government are responsible for about 55% of the total waste disposed at the site; but one party of the four account for 52% of the total waste. Moreover, the site has a Mitre score of less than six and does not even appear on the National Priorities List. Finally, the government has yet to make an analysis to determine whether the site presents an endangerment, though the Mitre score would indicate otherwise. And, while the four parties have offered, an environmentally sound, technologically reliable remedial alternative, the government has yet to approve it and is seeking to have further remedial investigation performed.

The parties are currently attempting to forge ahead on a negotiated settlement which would permit clean up to begin. But to date, three years after court action began, no remedial work has begun on the site. Even if it were to begin, it is clear that the parties named could be involved in court for many years attempting to recover costs from other contributors to the site.

5.

THE ROCKY MOUNTAIN ARSENAL

In United States v. Shell Oil Company, (No. 83-C-2379, D.Colo.), the full power and investigative authority of the federal government is trained on a private defendant with respect to the Rocky Mountain Arsenal site near Denver to the exclusion of an equally culpable federal party. The site, which is in fact a 27-square-mile area, is owned by the United States and has allegedly been extensively contaminated by as the result of various manufacturing operations carried out there. Shell operated a large pesticide manufacturing facility on the property which is likely responsible for some of the demonstrated releases. But the Army has also used the property for over 40 years for industrial operations, including the manufacture, storage and disposal of chemical warfare agents and other conventional munitions, and operated the waste utilities for much of the area. These operations have admittedly contributed to releases at the site, yet the government is seeking essentially full relief from Shell. The doctrine of joint and several liability is the underlying basis for the government's unjust approach.

6.

OTTATI AND GOSS/KINGSTON STEEL DRUM

BACKGROUND

Beginning in 1978, Ottati and Goss Corporation (O&G) conducted hazardous waste processing operations on a one-acre site in Kingston, New Hampshire. On an adjacent six-acre tract, Kingston Steel Drum Company (KSD), jointly with O&G, reconditioned and rented 55-gallon drums provided by an off-site paint manufacturer. In a short span of time, approximately 4,300 corroding and leaking drums accumulated on these properties, and in July 1979 the State of New Hampshire began proceedings against these two firms.

Studies showed that both surface and groundwater at the site were contaminated with volatile organic compounds. In addition, the contamination was spreading off the site and potentially threatened a pond used for swimming and fishing located 0.3 miles down gradient from this site.

U.S. EPA INVOLVEMENT

In October 1981, the U.S. Environmental Protection Agency joined the State in its actions against Ottati and Goss and Kingston Steel Drum by placing the two sites on the Superfund National Priorities List and beginning clean-up activities at the sites. It followed this with Superfund Section 106 letters to 10 potentially responsible parties (PRPs) in Spring 1982. These letters notified the responsible parties that EPA intended to clean up the two sites and invited the parties to take the lead in conducting an investigation of the site and undertaking remedial action. After negotiations failed, EPA went ahead with preliminary fund-financed action. By the summer of 1982, EPA had spent $1.7 million dollars in CERCLA emergency funds to remove drummed wastes from the two properties.

PRP ACTIONS

In the meantime, the 10 PRPs originally notified by EPA were seeking additional responsible parties to share their liability. These third parties were then sued by the PRPs via contribution suits.

In September 1982, the Hartford Insurance Group was notified by one of its insureds that the insured, as an off-site waste generator to the O&G site, had received one of EPA's notification letters in March. It had in the meantime retained counsel and was now asking its insurer to assume the costs of its defense. The Hartford responded to its insured with a Reservation of Rights Letter — a standard response indicating that the insurer would pay for the defense of the insured but was not prepared to admit coverage liability under the terms of the policy.

EPA VERSUS PRP PROCEEDINGS

In January 1983, the U.S. EPA filed a formal complaint against 16 defendants who were allegedly implicated in the dumping at the O&G and KSD sites. The list of 16 was considered to be current and complete and included the original PRPs and additional companies that were first brought in as third parties by the PRPs but were ultimately sued directly by the government. The State of New Hampshire and the Town of Kingston entered the suit as plaintiff intervenors. Two of the defendants, Great Lakes Container Corporation, parent company of Kingston Steel Drum, and Senter Transportation Company, lessor of the land to Ottati and Goss, filed cross complaints against both O&G and KSD.

In early 1983, the Hartford, representing one of the potentially responsible parties notified by EPA, approached the EPA with a $150,000 settlement offer for its insured (8.7 percent share of $1.7 million spent by EPA), an offer which was ultimately rejected by EPA.

In April 1983, EPA signed a cooperative agreement with the State of New Hampshire to undertake a $872,000 Remedial Investigation/Feasibility Study (RI/FS).

The trial of U.S. EPA and the Town of Kingston, New Hampshire versus 16 defendants began in December 1983. Trial testimony concluded 14 months (113 trial days) and 7,000 pages later. After an interim period to submit and reply to trial briefs, the court will make a decision on the liability issue only. Proceedings regarding the appropriate remedy will follow. The trial is the first multigenerator trial under CERCLA. Many PRP spokesmen claim that it was EPA's initial unwillingness to settle out of court, thus forcing the court case, that led to unnecessary delays in litigation proceedings and substantial transaction costs.

COST ESTIMATES

By March 1985, bills for legal costs for the Hartford's one insured party had totaled approximately $575,000. Total litigation costs for insurance coverage issues for the case range from $750,000 to $800,000. Total litigation costs to PRPs to date are approximately $3.5 million.

No specific estimates of government litigation costs to date are available; however, it is understood that these costs could exceed $500,000. Private party and government litigation expenses have been incurred for the liability phase of the trial only. Substantial additional litigation expenses are expected when the remedy portion of the trial is heard.

An estimated $10 million in addition to the $1.7 million already spent is required for cleanup.

A summary of projected and expended costs and a brief chronology follow.

SUMMARY OF O&G/RSD COSTS

Number of PRPs: 18 (originally 10)

RI/FS Cost by EPA: $372,000

CLEAN-UP COSTS

Total Estimated Subsurface Clean-up Cost: $10 million

Clean-up Costs to Date (EPA): $1.7 million

LITIGATION COSTS

Attorney fees for one defendant: (8.7% share) $375,000

Total estimated PRP litigation fees to date: (including experts) $3.2-3.8 million[a]

COVERAGE ISSUES

Suits Pending:	Two PRPs are currently suing their insurance carriers, one of which has policies with 40 carriers.
Suits Settled:	One PRP settled with one insurance carrier, decision reached January 1984 for no coverage under Comprehensive General Liability (including no coverage for defense costs).

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[a] Total includes litigation expenses by all PRPs — in-house and outside counsel, technical studies, third-party suits, and administrative and management expenses.

OTTATI & GOSS/KINGSTON STEEL DRUM

SUMMARY OF TIME SCHEDULE

July 1979	State begins proceedings against O&G/KSD.
October 1981	U.S. EPA places site on NPL.
Spring 1982	Superfund Section 106 letters are sent to PRPs.
July 1982	EPA finishes cleanup of surface waste.
January 1983	U.S. EPA files formal complaint against PRPs.
April 1983	RI/FS begins.
December 1983	Trial begins — U.S. EPA versus PRPs.
February 1985	Trial on liability issues concludes.

7.

LONE PINE

BACKGROUND

The Lone Pine Landfill is located in Freehold, New Jersey. Incorporated in 1959, this landfill was active until 1979 when it was closed by the New Jersey Department of Environmental Protection. During the bulk of its operational life, Lone Pine received primarily municipal and septic wastes, with industrial wastes constituting between 6 and 10 percent of its volume. In 1977 and 1978, however, a criminal conspiracy between a waste hauler (Scientific Chemical Processors) and Lone Pine employees led to the illegal disposal of substantial quantities of toxic industrial wasts. It was the disposal of these wastes which ultimately triggered the involvement of the State Department of Environmental Protection and the closing of the site.

The Lone Pine Landfill is situated on a 155-acre tract. The dump itself is about 50 acres in size and contains an estimated 30 to 50 thousand barrels of toxic chemical wastes. The headwaters of the Manasquan River run approximately 300 feet from the landfill. This river, while not now used for drinking water supplies, industry, or agriculture, is the source for a planned reservoir serving New Jersey's Monmouth and Ocean counties.

The Freehold Township sued the State in 1979 to close the Lone Pine landfill. The site was closed in the same year and the New Jersey Department of Environmental Protection sued only the Lone Pine operator, not the waste generators.

U.S. EPA INVOLVEMENT

The United States Environmental Protection Agency got involved at the site in 1981. In October 1981, the EPA placed Lone Pine on the Superfund National Priorities List and began an investigation to determine the extent of contamination at the site and to evaluate clean-up options. At the same time, it initiated a search for potentially responsible parties (PRPs). As part of this search, questionnaires were sent in early 1982 to known and suspected users of the Lone Pine Landfill, seeking information about the types and quantities of wastes sent to Lone Pine. EPA also sought to involve potentially responsible parties in both its study of the site and evaluation of remedial alternatives. The Agency first identified 83 PRPs (site operators and waste generators) all of whom declined to participate directly in the EPA study. Finally, in the Fall of 1982, EPA brought suit against Lone Pine and other defendants, seeking to compel cleanup of the Lone Pine site.

PRP ACTIONS

When there are multiple potentially responsible parties involved, the lawsuit becomes substantially more complicated. Under the joint and several liability clause that has previously been invoked in Superfund cases, a minority of parties involved can be liable for the entire damage assessed during the proceedings. However, these parties can in turn seek other responsible parties who can be added as third-party defendants or can be sued later in a contribution suit. Therefore when a suit is brought against some but not all parties, the chance of further contribution suits is substantially increased and further delays in the proceedings with additional transaction costs are likely. In the case of Lone Pine, 80 PRPs were notified, a number which did not include all the parties potentially liable.

In March 1983, the Aetna Life and Casualty Company was notified by a broker that a company it insured had been named by EPA in the Lone Pine suit. The insured company was a major manufacturer of consumer products that had been covered for nine years by Aetna under a standard Comprehensive General Liability (CGL) policy. Aetna responded to this notification with a Reservation of Rights letter -- a standard response indicating that the insurer would pay for the defense of the insured but was not prepared to admit coverage liability under the terms of the policy. In this instance, the key issues with respect to coverage were whether the events that caused damage at Lone Pine were sudden, as opposed to gradual, and intended, as opposed to unforeseen and unintended. CGL policies are typically written to exclude from coverage any damages that are caused by gradual events and any damages that are intended from the standpoint of the insured party.

In response to EPA's actions against them, five of the largest potentially responsible parties (held liable for 86 percent of waste at the site) joined forces to create the Lone Pine Steering Committee in the Spring of 1983. The purpose of the Steering Committee was to coordinate the efforts of these five firms in the Lone Pine case. The Steering Committee, in addition to handling the legal defense of the five companies, undertook a variety of technical investigations at the site to determine the extent of the pollution problem and to assess remedial options. These studies included an analysis of the environmental condition of the upper Manasquan River and a study of the cost of closing the landfill.

PRELIMINARY SITE INVESTIGATIONS

In June 1983, EPA released a draft of the first Remedial Investigation/Feasibility Study (RI/FS) of the Lone Pine site. The RI/FS costing $330,000 reviewed five remedial options for Phase I (surface cleanup), with total clean-up costs ranging from $8.4 million to $30.8 million. EPA's preferred option included capping the site, constructing an underground wall around the site, and pumping and treating on-site contaminated groundwater, at an expected cost of $17.0 million.

To collectively respond to these and other actions taken by EPA, the first meeting of the notified PRPs in the Lone Pine case took place in the spring of 1983, with 82 generators represented. Their tasks were to comment on the EPA-authored RI/FS and to help to identify additional PRPs to bring in to ongoing discussions with EPA. The search for additional PRPs undertaken jointly by EPA and existing PRPs continued from June 1983 to June 1984.

In contrast to the EPA's site recommendations, the Steering Committee, after undertaking engineering studies of its own, proposed an alternative plan which also included capping the site but would monitor groundwater conditions before embarking on a groundwater containment and treatment program. This alternative was based on the environmental assessment of the upper Manasquan River, which showed no significant contamination of the river as yet by landfill leachate or runoff.

EPA VERSUS PRP PROCEEDINGS

After EPA completed a supplemental feasibility study in June 1984, and after numerous meetings with PRPs and the Lone Pine Steering Committee, the EPA recommended moving forward with a $17 million clean-up program. EPA sent a second round of notification letters to an expanded list of 142 potentially responsible parties notifying each of their statutory right to undertake proper remedial action at Lone Pine prior to EPA's use of federal fund monies and subsequent cost recovery. This list of 142 PRPs was considered to be complete, given all available information gathered at that time.

During this time, Aetna received notices from two additional insured parties that they had recently been named as defendants in the EPA suit. In each case Aetna initiated an investigation into the type of coverage provided to the insured and ultimately sent each a Reservation of Rights letter, assuming the cost of defense but not acknowledging liability.

In September 1984 the Agency's Record of Decision (ROD) outlining a $17 million cleanup at Lone Pine was signed. The EPA then began clean-up efforts at the site without having been assured of any commitment on the part of the PRPs. However, the Steering Committee sought to block EPA's clean-up effort on the grounds that EPA's decision was made without full judicial review and review by the defendants. The Steering Committee asked for a preliminary injunction and a temporary restraining order barring EPA from implementing its remedial action program at Lone Pine.

In January 1985, a court decision was reached in the suit of the Steering Committee against EPA rejecting the Steering Committee's position and allowing EPA to move forward with its clean-up proposal. The Steering Committee is currently appealing this decision. In addition, the Committee is attempting to include municipal waste generators (i.e., nearby towns) in the list of PRPs, claiming that municipalities are also responsible for the toxicity of the Lone Pine site.

There has been no remedial action at Lone Pine to date, 3.5 years after placement of the site on the Superfund National Priorities List.

A summary of projected and expended costs and a brief chronology follow.

SUMMARY OF LONE PINE COSTS

Number of PRPs to Date:	143 (originally 83)
RI/FS Cost by EPA:	$500,000
PRP-Funded Engineering Studies:	$200,000

CLEAN-UP COSTS

Total Estimated Surface Cleanup Cost (EPA):	$17 million
Total Estimated Surface Cleanup Cost (Steering Committee):	$9.9 million
Clean-up Costs to Date (EPA):	$1.0 million

LITIGATION COSTS

Estimated Litigation Costs to Date*:	$1-2.5 million
1985 Litigation Budget for 1 (1% Share) PRP**:	$75,000
Litigation Expenses by 1 (21% share) PRP: (for legal fees and site studies to 11/84)	$210,000
Projected PRP Litigation Costs to Settle: ($1.1 million in-house + $3.25 million outside counsel)	$4.3 million

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* Includes litigation expenses by PRPs only.

** The PRP believes that its litigation share is larger than its liability share.

ANSWERS TO ADDITIONAL QUESTIONS BY SENATOR THURMOND TO GEORGE FREEMAN

> Do you agree with the view of EPA that it can impose joint and several liability under Superfund whenever a defendant cannot show that the "harm is indivisible"? Or do you agree with the Department of Justice that a defendant must prove both divisibility of the harm and a reasonable basis for apportionment of damages to avoid joint and several liability?

Recent statements to this effect by EPA or the Department of Justice do not correctly reflect the emerging district court trend under Superfund. All the federal district courts that have to date ruled on this issue have only held that Congress did not intend to preclude the application of joint and several liability to Superfund defendants when it deleted the words "joint and several" from the bill. Thus in these cases, the judge has only refused to dismiss cases on the pleadings or to strike the requisite words from the Government's complaint.[1] In the cases that have discussed applicable criteria, the courts have looked primarily for guidance to the Restatement (Second) for joint and several liability is appropriate in CERCLA cases.[2]

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[1] United States v. A & F Materials Co., 578 F.Supp. 1249, 1255 (S.D.Ill. 1984); United States v. Wade, 577 F.Supp. 1326, 1338 (E.D.Pa. 1983); United States v. Chem-Dyne Corp., 572 F.Supp. 802, 810-11 (S.D.Ohio 1983); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1909 (C.D.Cal. Apr. 5, 1984); United States v. South Carolina Recycling & Disposal, Inc., 20 Env't Rep. Cas. 1753, 1759 (D.S.C. Feb. 23, 1984).

The Restatement (Second) of Torts limits severely the conditions under which joint and several liability may be imposed. Not only is joint and several liability to be denied in cases of a divisible harm but also in cases where there is a single harm for which there is a reasonable basis for division according to the contribution of each defendant.[3] As a member of the American Law Institute Council, I have been distressed that EPA and the Justice Department, while citing our Restatement, generally have in practice chosen to ignore this essential limitation on our general rule. This limitation has generally been respected by America's major tort scholars, who point to pollution cases, usually state common law nuisance cases, as classic examples of situations where liability can be apportioned on a reasonable basis even through the harm itself is indivisible. Prosser and Keeton's 1984 hornbook, for example, states:

2/ E.g., United States v. A & F Materials Co., 578 F.Supp. 1249, 1255 (S.D.Ill. 1984); United States v. Wade, 577 F.Supp. 1326, 1328 (E.D.Pa. 1983); United States v. Chem-Dyne, 572 F.Supp. 802, 810 (S.D.Ohio 1983); United States v. Stringfellow, 20 Env't Rep. Cas. 1905, 1909 (Apr. 5, 1984).

3/ Restatement (Second) of Torts § 821.

> Nuisance cases, in particular, have tended to result in apportionment of the damages, largely because the interference with the plaintiff's use of land has tended to be severable in terms of quantity, percentage, or degree. Thus defendants who independently pollute a stream, or who flood the plaintiff's land from separate sources, are liable only severally for the damages individually caused, and the same is true as to nuisances due to noise, or pollution of the air.[4]

Only United States v. South Carolina Recycling and Disposal, Inc., an unreported district court opinion which the Government itself drafted,[5] among all the CERCLA cases decided thusfar appears to adopt the contrary view that divisibility of the harm should be the sole basis for denying the applicability of joint and several liability in the CERCLA context.[6] This is yet one more example of how EPA and Justice positions in CERCLA cases are seeking to undermine long established common law principles.

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[4] Prosser & Keeton, § 52, at p. 349 (4th ed. 1984).

[5] 20 Env't Rep. Cas. 1753 (D.S.C. Feb. 23, 1984).

[6] Although the South Carolina Recycling court cites a previous Chem-Dyne opinion in support of its view, South Carolina Recycling, 20 Env't Rep. Cas. at 1758-59, Chem-Dyne actually follows the Restatement approach allowing limitation of damages where there is a reasonable basis for apportionment. See Chem-Dyne, 572 F.Supp. at 810, citing Restatement (Second) § 821. The Government-written opinion conveniently overlooks this discussion in the Chem-Dyne case because of the Court's subsequent emphasis on lack of divisibility of the harm, id. at 811, in denying defendant's motion to strike joint and several liability allegations. At worst, Chem-Dyne is ambiguous on the issue of whether that court would limit liability to proportionate shares where there is a reasonable basis for apportionment of an indivisible harm.

Although the Government universally asserts that liability under CERCLA is strict, joint and several, it is interesting to note that the Justice Department's top lawyer in this area has now admitted several times in Congressional testimony that the Government is unlikely to succeed in imposing liability for the entire costs of cleanup on persons whose contribution to the cleanup problem is demonstrably limited (i.e., there is a reasonable basis for apportionment). Assistant Attorney General Habicht has testified that joint and several liability is not and should not be available "to impose liability grossly out of proportion with someone's factual contribution." He stated, "[W]e have not and don't intend to and I don't think we can impose liability for 100 percent of the costs on a de minimis contributor." Congressman Florio recently commented in a Superfund reauthorization hearing before his subcommittee that he too believed that the present law allows persons to show their limited contribution and to thereby limit their liability under CERCLA. Senator Domenici has expressed similar sentiments.

Assuming that Congressman Florio, Senator Domenici, and all the federal district courts except the one that decided South Carolina Recycling are correct, there may be cases where defendants held liable in a CERCLA case will not be found jointly and severally liable for the entire cleanup costs even though the harm is indivisible. In such instances, it is obvious that there may be "orphan shares," that is, shares of liability for which the Government will not recover its costs. This is because present and solvent defendants will have limited their liability, and there may be substances to which no party can be traced or which are traced to insolvent parties.

As Prosser and Keeton put the matter:

> If entire liability is imposed on each wrongdoer, an injured person may in fact recover full damages if any one of the wrongdoers is financially responsible, even though others are not. If instead liability is apportioned, the injured persons bear the risk of financial responsibility of each wrongdoer.[7/]

That the Government (injured party) would bear the risk of financial irresponsibility as well as the risk that certain parties cannot be found or certain substances traced is a necessary consequence of a court not finding present and solvent parties liable for the entire harm, i.e., not finding joint and several liability.

In 1980, the Superfund bill which passed the House prior to the lame duck session clearly provided a liability

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7/ Prosser & Keeton, § 52, at p. 351.

regime consonant with the Restatement (Second) of Torts system described above. H.R. 7020, § 3071(a)(2) provided:

> (2)(A) If a generator or transporter of hazardous waste establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste generated or transported by him, such generator or transporter shall be liable under this subsection only for such portion. If the owner or operator of any inactive hazardous waste site establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste which was treated, stored, or disposed of in a period during which he owned or operated the site, such owner or operator shall be liable under this section only for such portion.
>
> (B) To the extent apportionment is not established under subparagraph (A), the court shall apportion the liability, to the maximum extent practicable, among the parties based upon evidence presented by the parties as to their contributions.
>
> (C) Following any apportionment under this paragraph, no person shall be required to pay in excess of his apportioned share of the total costs . . . .

The House Superfund reauthorization bill which passed the House in 1984, while somewhat more ambivalent on the point, appears to follow H.R. 7020 on this point. The 1984 bill, H.R. 5640, § 115(d) provides:

> (1)(1) Nothing in this section shall be construed to affect the equitable powers of apportionment of any court following adjudication of liability.
>
> . . .

> (2) If a defendant in an action under this section establishes by a preponderance of the evidence that the harm . . . is divisible, he should be liable for his portion.

The House Report clarifies the provision set forth in paragraph (1):

> If defendants are unable to meet such burden of estabishing divisibility and following a court's determination to impose joint and several liability and to enter a judgment on the merits, the court may exercise its equitable powers to apportion the total costs which the court determines are necessary to compenste for them. The apportionment of total costs or damages may be accomplished on the basis of any equitable formula deemed appropriate by the court and may take into consideration such factors as the defendants' contribution to the contamination at the site. For example, where several companies disposed of waste at a site where the harm was held to be indivisible and one company disposed of a low toxicity waste in small volume at the site, the court should use its equitable powers to limit the damages paid by the one defendant in relation to other liable parties. Following apportionment by the court, no defendant shall be required to pay more than his apportioned share of costs and damages.[8/]

In a hearing in April 1985, Congressman Florio explained that the provision included in H.R. 5640 in his view merely codifies current law and is not substantive. He stated:

> [T]here is the option for the defendant, the responsible defendant, to be able to show proportionate and for the court to be able to assign proportional damages . . .
>
> . . .
>
> [T]he qualification that we tried to put into last year's law was a clarification of what the law, some of us thought the law is. And I will be happy to communicate with the Justice Department as to what we maintain was the law.

A logical consequence of such liability regimes, with limitation of damages as in H.R. 7020 and H.R. 5640, is the Fund's bearing of ultimate responsibility for "orphan shares."

8/ H.R.Rep.No. 98-890 (Part I), 98th Cong., 2d Sess. 56 (1984) (emphasis added).

Senator McConnell. Thank you, Mr. Freeman. I want to apologize to you and to all the witnesses for the revolving door today, but that is just the way it is today and I am sorry about that.

I would like to ask that my opening statement be inserted in the record.

[The following was received for the record:]

Opening Statement of Senator McConnell

Mr. Chairman, I commend you for holding this hearing so that the Judiciary Committee might have the opportunity to examine some of the very significant aspects of S. 51, the Superfund reauthorization bill. I believe it fair to say that the importance of this legislation cannot be underestimated, for the problems it addresses are among the potentially most devasting problems facing our country. Moreover, because of the lasting damage that failure to deal effectively with toxic waste clean-up can have—failure that can result from our failure to pass a well-conceived bill—they are problems that can have consequences well into the future.

Like the other members of this committee, I am concerned that S. 51, as it currently stands, effects significant change in the system that we have created to identify responsible parties and see to their acceptance of liability. For instance, section 126 of the bill would preclude the prosecution of a contribution claim by a defendant in a government initiated lawsuit while the government's case is being pursued. If for no other reason, this section seems at odds with the notion of judicial economy. More troublesome for me is the suggestion that the protection from immediate exposure to liability will discourage those potentially responsible parties who are not named in the original lawsuit from participating in settlement negotiations.

This situation would be completely different from the current state of affairs, in which the prosecution of contribution claims is governed by the long established rules of procedure.

In addition, the bill proposes to create for the first time a private right of action on behalf of citizens—private attorneys general—who could file actions against a private party, a state, or even the President, to enforce the obligations of the act. Section 138 may be well intended, but the potential for interference by private citizens with the Environmental Protection Agency's enforcement activities is obvious. Moreover, as a logical proposition, I have reservations about the wisdom of creating private rights of action in connection with matters that are fundamentally public in nature.

Nevertheless, I have not come to any conclusion about these matters, and I look forward to the testimony of the witnesses, both from the administration and from private industry.

Thank you, Mr Chairman.

Senator McConnell. We also have several questions from Senator Grassley and Senator Specter that I would like submitted to you to be answered for the record, if you could, Mr. Freeman.

[The following was received for the record:]

ANSWERS TO QUESTIONS BY SENATOR GRASSLEY TO GEORGE FREEMAN

1. Sec. 117 (pp. 83-84) of S.51 would amend sec. 104 of CERCLA to provide "an opportunity for a public meeting" and "a reasonable opportunity to comment" to the public with "a reasonable explanation of the proposal and alternative proposals" in the notice of meeting.

   This is inconsistent with the APA amendments passed by the Senate in S.1080 which would provide opportunity for "oral presentations of data, views and information, opportunity to examine agency personnel or consultants who prepared the agency position, require "any factual or methodological material" be placed in the record, and for judicial review of agency final actions similar to the current APA sec. 706 provisions. (S.1080, sec. 3, pp. 7-10).

   If EPA remains free to respond to emergencies, why should the Senate exempt the Agency from the requirements included in S.1080?

There can be no excuse for EPA's deliberate avoidance of the Administrative Procedure Act's constraints. EPA has avoided the APA's requirements on policymaking by use of "informal policy guidance" documents which it characterizes as non-binding. Thus, S.1080's "anti-evasion" provision is needed. EPA has not promulgated any procedures for issuance of Superfund administrative orders. It has fought in the courts for an interpretation of Superfund to allow it to avoid timely judicial review. In light of EPA's avoidance, it is necessary that the express procedural requirements set forth in S.1080 be written into the Superfund statute and expressly made applicable to key non-emergency decisions such as (1) selection of a remedial action, (2) issuance of an administrative order, and (3) waiver of the monetary or time limits on a "removal" action.

As important as Superfund's objectives are, there are many other objectives at EPA and other government agencies with equal or higher priority. Yet we required EPA in the Clean Air Act, for example, to follow detailed procedures that anticipated the reforms in the Administrative Procedure Act made by S.1080. And all other agencies live by the APA. EPA has given no reasons why CERCLA matters should be resolved without the meaningful public scrutiny required by the APA. Moreover, the greater the initial discretion given EPA, the greater the need for thorough and searching judicial review, as would be the case under the Bumpers Amendment, as introduced by you, Senator Bumpers and others on June 6, 1985. S.1256. With respect to administrative orders, it may be appropriate for the Committee to consider mandating issuance of some procedural regulations guaranteeing an opportunity to be heard. The Justice Department's suggestion in its testimony that the Committee might authorize such regulations is unnecessary since the authority exists already under CERCLA § 115.

2. What is the Bumpers Amendment regarding the scope of judicial review? Would applying this Amendment to EPA activities under Superfund help solve the problems regarding judicial review which you identified in your testimony?

The Bumpers Amendment, which the Administration endorsed in 1982 and which has passed the Senate a number of times, affirms that the judiciary is to give no special deference to agency interpretations of the law but is rather to retain absolute independence. To paraphrase the Judiciary Committee's Report on S.1080, it is designed to take the bureaucrats' thumb off the scale of justice and is especially necessary where, as here, a statute is vague and the agency wishes to maintain maximum discretion. Applying the amendment to EPA's activities under Superfund could go a long way in preventing the abuses in the administrative process identified in my testimony.

3. Are there any useful ideas coming out of this Committee's past work on regulatory reform that can be used to help improve EPA's administrative process under Superfund? Please explain how they would help.

In addition to (1) the "anti-evasion" provision, (2) application of S.1080's revisions to APA § 553 to key Superfund decisions, and (3) the Bumpers amendment regarding the scope of judicial review, all mentioned above, the regulatory reform proposal requiring preparation of an analysis assessing cost-effectiveness could be helpful in preventing EPA's selection of remedies under Superfund from becoming "gold-plated." The Superfund statute requires remedies to be cost-effective, but many have criticized the government's activities as overly wasteful. All these reforms would work to insure timely and meaningful public participation in EPA's processes.

4. Please describe what you mean by the "Superfund litigation nightmare" in your proposed statement?

The Act before you, the Superfund Act, has the noblest of goals, the cleanup of America's most serious abandoned hazardous waste sites. But the Act passed in 1980 has proven to be seriously flawed. Those Senators who were here in 1980 may recall the uneasiness accompanying those hurried hours in the lame duck session when this legislation was passed. Senators Stafford and Randolph, the bill's floor leaders, reported to the House after the vote that "only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matters of hours, that fragile coalition began to disintegrate to the point that . . . it would now be impossible to pass the bill again, even unchanged."

From hindsight, we now know that the Superfund Act, despite its laudable objectives, does not reflect the best that can be achieved by the legislative process. Court after court trying to interpret the Act has found it "marred by vague terminology and deleted provisions." The statute has become the very antithesis of the predictability which is essential to the functioning of a modern, complex economy. Two ambiguities in the Act have proven especially destructive of predictability: retroactivity and the "joint and several" standard. Although some of us, including myself, had thought that the compromise legislation drafted in 1980 eliminated any application of a new, disproportionate liability for past acts, EPA and the Justice Department apparently have thought otherwise. They have convinced some trial courts that what you had in mind was actually to create retroactive, joint and several standard without any limit on the backward reach into the past and without any requirement that the liability imposed should bear any relationship to a person's contribution to the potential harm. As I indicated in my testimony, the liability imposed can be so disproportionate to the conduct involved as to make Superfund a punitive statute that cannot pass muster under constitutional principles.

This "interpretation," of course, makes the Lands Division's job of litigating Superfund cases much easier because it gives it great flexibility in choosing which defendants to sue -- a flexibility it does not, of course, wish to give up. But, there is a point beyond which the convenience of the government becomes an euphemism for arbitrary government, and that point has been passed in the government's enforcement of CERCLA.

EPA and the Justice Department further assert that the issues of fundamental fairness, unconstitutionality, and various other important liability issues left to the courts in 1980, now "have been set" and that legislative amendment will reopen settled issues. The facts, however, indicate the contrary. No Superfund issue has yet reached the Supreme Court; the retroactivity and joint and several issues only reached the first court of appeals this spring and have not yet been decided there; only two Superfund cases have trial court judgments and these in simple cases, and in the first of the numerous complex Superfund cases, a year long trial on liability issues only recently concluded with resolution of the case apparently years away. It is no wonder that a recent study indicates that, even if litigation becomes more efficient over time, Superfund litigation costs will end up adding $5 billion to EPA's $14.6 billion in projected cleanup costs.

The harsh and unfair liability regime EPA and Justice have been "developing" under Superfund has grave and unintended consequences ranging far beyond the Superfund program. The litigation system in the United States has become so arbitrary and unpredictable that both English and American insurers have constricted drastically the circumstances they are willing to insure. Coverage for gradual releases of pollution disappeared last year; pollution coverage for both gradual and sudden accidents is fast disappearing; and the crisis now threatens to expand into other important areas such as coverage for certain professionals.

Retroactive liability for conduct lawful prior to Superfund's enactment undermines any rational insurer's confidence that contracts entered into today will be honored down the road tomorrow. The Superfund litigation system, by creating strict liability claims for conduct engaged in long ago, spawns a series of lawsuits as defendants, in a desperate attempt to avoid unexpected "new" responsibilities imposed by the Government, seek to shift their costs to other third parties or to their insurers for past policy periods. Joint and several liability makes an insured's conduct irrelevant to his or his insurer's liability exposure by subjecting the innocent to responsibility for the sins of the guilty at the whim of the prosecutor's exercise of discretion.

Aside from fairness, these concepts preclude insurability by fostering unpredictability. This point has been lost on EPA and Justice, who assert and obviously hope that the insurance industry is "bluffing" and will reenter the environmental insurance market when general economic conditions improve. They would have the insurers rely upon the Government's reasonable exercise of prosecutorial discretion, in a "settlement policy," abandoning hope for a rule of law in favor of a rule of "reasonable men." In fact, whether a Congressional return to a more rational and fairer Superfund litigation system can in and of itself entreat the London reinsurers and American insurers experiencing huge losses in asbestos, medical malpractice, as well as environmental claims, back to this country is questionable. But without a return to the fundamental legal principles which our country traditionally has shared with Britain, it is self-evident that there can be no return.

EPA and Justice do not dispute the unfairness of the regime they advocate. One district court recently characterized the Government's attitude as "an arrogance of power that is bureaucracy at its worst." EPA seems willing to sacrifice both equity and insurability in the hope that the threat of huge and unfair liability will increase settlement prospects in its cases. Even on this score, however, the

Agency and the Department have been unable to produce facts and figures to demonstrate that Government coercion produces quicker cleanup than fairness. Instead, the Government explains away its failures to bring cost recovery suits where cleanup is allegedly progressing; it speaks of capacity limits and limited resources despite large, continuing surpluses in the Fund; it denies any Governmental ability to apportion liability among responsible parties perhaps to explain why "joint and several" is needed; at the same time, it characterizes Superfund defendants by "waste volume represented" (*i.e.*, apportions liability) in order to explain why it is not "actually" imposing the disproportionate liability made possible by the "joint and several" concept. Perhaps most telling is the Government's studied ignorance of the private sector litigation costs it has provoked -- a professed ignorance about costs which clearly influence any defendant's ability or willingness to settle.

The tragic reality of Superfund is that it is not producing the cleanup Congress intended. The principal demonstrable outcome of the litigative regime so far is the enrichment of lawyers, especially high-priced Washington, D.C. lawyers. Litigation has not produced the expeditious cleanup Congress sought in this legislation. We ought at least to try the approach many of us thought had been started in 1980 -- where the Superfund finances cleanup, not lawsuits. One way to start would be to prohibit any use of Superfund moneys for litigation and make litigation expenses be borne solely out of both EPA's and Justice's normal appropriations.

Senator McCONNELL. We also have some committee questions which will be asked by whomever comes at 1, and I have 2 minutes to get to the floor. So the hearing is going to have to stand in recess.

Mr. FREEMAN. Thank you.

[A recess was taken.]

The CHAIRMAN. The committee will come to order.

Mr. Freeman, I believe you gave your opening statement.

Mr. FREEMAN. Yes, sir.

The CHAIRMAN. I have a few questions here. In your prepared statement, you raised serious questions about the fundamental fairness and constitutionality of retroactive application of strict, joint, and several liability. The committee would also appreciate you briefly summarizing those views for us here today.

Mr. FREEMAN. Yes, sir. Under the common law which underlies our Constitution, statutes were never to be interpreted as applying retroactively. Blackstone, Lord Coke, all of them, thought that to do so punished a person for prior conduct which was innocent.

That fundamental concept comes over in our Constitution and is reflected in a number of provisions; not only the concept of due process, but the ex post facto clause, the bill of attainder clause, and many others.

Here, under EPA's interpretation of the statute, a person can be held strictly, jointly, and severally liable so disproportionate to his prior conduct as to give this statute a punitive cast, and it is the punitive cast put on the statute by joint and several liability that makes it a de facto criminal law.

As such, it cannot survive any of those constitutional tests.

The CHAIRMAN. I have not been here for the full hearing. Have you answered in your statement in what, if any, ways Superfund departs from general legal principles and traditions? Have you brought that out?

Mr. FREEMAN. I have to some extent, but I would like to supplement that as follows.

The CHAIRMAN. All right.

Mr. FREEMAN. I have worked over the years with this committee as one of the two representatives of the American Bar Association on your Federal criminal code. I am quite familiar with how that is enforced.

EPA has come before you today and said that because the environment is so important and because this cleanup is so important, it ought to be free from the normal rules of the Administrative Procedure Act; that it ought to be freed from the normal application of the rules for civil procedure. It ought to be freed from the normal rules of evidence that require proof of culpability or causation, and it ought to be freed from normal judicial review standards.

As important as the protection of the environment is, so is the protection of the citizen from crime. Yet, the FBI, the Justice Department, and the States do not come up here and ask Congress to be freed from the traditional rules that are enforced or any of these constitutional requirements. Just as they stay within the normal rules of procedure in protecting us from crime, EPA should be forced to stay within the normal rules in protecting us from hazardous wastes. Once Congress starts making exceptions in the name of expediency, the exceptions will soon swallow the general rules.

The CHAIRMAN. Thank you. I have a few more questions here that I would like to get you to answer for the record.

[The following were received for the record:]

ANSWERS TO ADDITIONAL QUESTIONS BY SENATOR THURMOND TO GEORGE FREEMAN

> Do you agree with the view of EPA that it can impose joint and several liability under Superfund whenever a defendant cannot show that the "harm is indivisible"? Or do you agree with the Department of Justice that a defendant must prove both divisibility of the harm and a reasonable basis for apportionment of damages to avoid joint and several liability?

Recent statements to this effect by EPA or the Department of Justice do not correctly reflect the emerging district court trend under Superfund. All the federal district courts that have to date ruled on this issue have only held that Congress did not intend to *preclude* the application of joint and several liability to Superfund defendants when it deleted the words "joint and several" from the bill. Thus in these cases, the judge has only refused to dismiss cases on the pleadings or to strike the requisite words from the Government's complaint.1/ In the cases that have discussed applicable criteria, the courts have looked primarily for guidance to the *Restatement (Second)* for joint and several liability is

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1/ *United States* v. *A & F Materials Co.*, 578 F.Supp. 1249, 1255 (S.D.Ill. 1984); *United States* v. *Wade*, 577 F.Supp. 1326, 1338 (E.D.Pa. 1983); *United States* v. *Chem-Dyne Corp.*, 572 F.Supp. 802, 810-11 (S.D.Ohio 1983); *United States* v. *Stringfellow*, 20 Env't Rep. Cas. (BNA) 1905, 1909 (C.D.Cal. Apr. 5, 1984); *United States* v. *South Carolina Recycling & Disposal, Inc.*, 20 Env't Rep. Cas. 1753, 1759 (D.S.C. Feb. 23, 1984).

appropriate in CE.

The Restatement (Second) of Torts limits severely the conditions under which joint and several liability may be imposed. Not only is joint and several liability to be denied in cases of a divisible harm but also in cases where there is a single harm for which there is a reasonable basis for division according to the contribution of each defendant.3/ As a member of the American Law Institute Council, I have been distressed that EPA and the Justice Department, while citing our Restatement, generally have in practice chosen to ignore this essential limitation on our general rule. This limitation has generally been respected by America's major tort scholars, who point to pollution cases, usually state common law nuisance cases, as classic examples of situations where liability can be apportioned on a reasonable basis even through the harm itself is indivisible. Prosser and Keeton's 1984 hornbook, for example, states:

> Nuisance cases, in particular, have tended to result in apportionment of the damages, largely because the interference with the plaintiff's use of land has tended to be severable in terms of quantity, percentage, or degree. Thus defendants who independently pollute a stream, or who flood the

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2/ E.g., United States v. A & F Materials Co., 578 F.Supp. 1249, 1255 (S.D.Ill. 1984); United States v. Wade, 577 F.Supp. 1326, 1328 (E.D.Pa. 1983); United States v. Chem-Dyne, 572 F.Supp. 802, 810 (S.D.Ohio 1983); United States v. Stringfellow, 20 Env't Rep. Cas. 1905, 1909 (Apr. 5, 1984).

3/ Restatement (Second) of Torts § 821.

> plaintiff's land from separate sources, are liable only severally for the damages individually caused, and the same is true as to nuisances due to noise, or pollution of the air.[4]

Only *United States* v. *South Carolina Recycling and Disposal, Inc.*, an unreported district court opinion which the Government itself drafted,[5] among all the CERCLA cases decided thusfar appears to adopt the contrary view that divisibility of the harm should be the sole basis for denying the applicability of joint and several liability in the CERCLA context.[6] This is yet one more example of how EPA and Justice positions in CERCLA cases are seeking to undermine long established common law principles.

Although the Government universally asserts that liability under CERCLA is strict, joint and several, it is interesting to note that the Justice Department's top lawyer in this area has now admitted several times in Congressional testimony that the Government is unlikely to succeed in imposing liability for the entire costs of cleanup on persons whose contribution to the cleanup problem is demonstrably limited (i.e., there is a reasonable basis for apportionment). Assistant Attorney General Habicht has testified that joint and several liability is not and should not be available "to impose liability grossly out of proportion with someone's factual contribution." He stated, "[W]e have not and don't intend to and I don't think we can impose liability for 100 percent of the costs on a de minimis contributor." Congressman Florio recently commented in a Superfund reauthorization hearing before his subcommittee that he too believed that the present law allows persons to show their limited contribution and to thereby limit their liability under CERCLA. Senator Domenici has expressed similar sentiments.

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[4] Prosser & Keeton, § 52, at p. 349 (4th ed: 1984).

[5] 20 Env't Rep. Cas. 1753 (D.S.C. Feb. 23, 1984).

[6] Although the *South Carolina Recycling* court cites a previous *Chem-Dyne* opinion in support of its view, *South Carolina Recycling*, 20 Env't Rep. Cas. at 1758-59, *Chem-Dyne* actually follows the Restatement approach allowing limitation of damages where there is a reasonable basis for apportionment. *See* *Chem-Dyne*, 572 F.Supp. at 810, citing Restatement (Second) § 821. The Government-written opinion conveniently overlooks this discussion in the *Chem-Dyne* case because of the Court's subsequent emphasis on lack of divisibility of the harm, *id.* at 811, in denying defendant's motion to strike joint and several liability allegations. At worst, *Chem-Dyne* is ambiguous on the issue of whether that court would limit liability to proportionate shares where there is a reasonable basis for apportionment of an indivisible harm.

Assuming that Congressman Florio, Senator Domenici, and all the federal district courts except the one that decided South Carolina Recycling are correct, there may be cases where defendants held liable in a CERCLA case will not be found jointly and severally liable for the entire cleanup costs even though the harm is indivisible. In such instances, it is obvious that there may be "orphan shares," that is, shares of liability for which the Government will not recover its costs. This is because present and solvent defendants will have limited their liability, and there may be substances to which no party can be traced or which are traced to insolvent parties.

As Prosser and Keeton put the matter:

> If entire liability is imposed on each wrongdoer, an injured person may in fact recover full damages if any one of the wrongdoers is financially responsible, even though others are not. If instead liability is apportioned, the injured persons bear the risk of financial responsibility of each wrongdoer.7/

That the Government (injured party) would bear the risk of financial irresponsibility as well as the risk that certain parties cannot be found or certain substances traced is a necessary consequence of a court not finding present and solvent parties liable for the entire harm, i.e., not finding joint and several liability.

In 1980, the Superfund bill which passed the House prior to the lame duck session clearly provided a liability regime consonant with the Restatement (Second) of Torts system described above. H.R. 7020, § 3071(a)(2) provided:

> (2)(A) If a generator or transporter of hazardous waste establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous waste generated or transported by him, such generator or transporter shall be liable under this subsection only for such portion. If the owner or operator of any inactive hazardous waste site establishes that only a portion of the total costs described in subsection (b) are attributable to hazardous

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7/ Prosser & Keeton, § 52, at p. 351.

> waste which was treated, stored, or disposed of in a period during which he owned or operated the site, such owner or operator shall be liable under this section only for such portion.
>
> (B) To the extent apportionment is not established under subparagraph (A), the court shall apportion the liability, to the maximum extent practicable, among the parties based upon evidence presented by the parties as to their contributions.
>
> (C) Following any apportionment under this paragraph, no person shall be required to pay in excess of his apportioned share of the total costs . . . .

The House Superfund reauthorization bill which passed the House in 1984, while somewhat more ambivalent on the point, appears to follow H.R. 7020 on this point. The 1984 bill, H.R. 5640, § 115(d) provides:

> (1)(1) Nothing in this section shall be construed to affect the equitable powers of apportionment of any court following adjudication of liability.
>
> . . . .
>
> (2) If a defendant in an action under this section establishes by a preponderance of the evidence that the harm . . . is divisible, he should be liable for his portion.

The House Report clarifies the provision set forth in paragraph (1):

> If defendants are unable to meet such burden of estabishing divisibility and following a court's determination to impose joint and several liability and to enter a judgment on the merits, the court may exercise its equitable powers to apportion the total costs which the court determines are necessary to compenste for them. The apportionment of total costs or damages may be

> accomplished on the basis of any equitable formula deemed appropriate by the court and may take into consideration such factors as the defendants' contribution to the contamination at the site. For example, where several companies disposed of waste at a site where the harm was held to be indivisible and one company disposed of a low toxicity waste in small volume at the site, the court should use its equitable powers to limit the damages paid by the one defendant in relation to other liable parties. Following apportionment by the court, no defendant shall be required to pay more than his apportioned share of costs and damages.8/

In a hearing in April 1985, Congressman Florio explained that the provision included in H.R. 5640 in his view merely codifies current law and is not substantive. He stated:

> [T]here is the option for the defendant, the responsible defendant, to be able to show proportionate and for the court to be able to assign proportional damages . . .
>
> . . .
>
> [T]he qualification that we tried to put into last year's law was a clarification of what the law, some of us thought the law is. And I will be happy to communicate with the Justice Department as to what we maintain was the law.

A logical consequence of such liability regimes, with limitation of damages as in H.R. 7020 and H.R. 5640, is the Fund's bearing of ultimate responsibility for "orphan shares."

8/ H.R.Rep.No. 98-890 (Part I), 98th Cong., 2d Sess. 56 (1984) (emphasis added).

ANSWERS TO QUESTIONS BY
SENATOR GRASSLEY TO GEORGE FREEMAN

1. Sec. 117 (pp. 83-84) of S.51 would amend sec. 104 of CERCLA to provide "an opportunity for a public meeting" and "a reasonable opportunity to comment" to the public with "a reasonable explanation of the proposal and alternative proposals" in the notice of meeting.

   This is inconsistent with the APA amendments passed by the Senate in S.1080 which would provide opportunity for "oral presentations of data, views and information, opportunity to examine agency personnel or consultants who prepared the agency position, require "any factual or methodological material" be placed in the record, and for judicial review of agency final actions similar to the current APA sec. 706 provisions. (S.1080, sec. 3, pp. 7-10).

   If EPA remains free to respond to emergencies, why should the Senate exempt the Agency from the requirements included in S.1080?

There can be no excuse for EPA's deliberate avoidance of the Administrative Procedure Act's constraints. EPA has avoided the APA's requirements on policymaking by use of "informal policy guidance" documents which it characterizes as non-binding. Thus, S.1080's "anti-evasion" provision is needed. EPA has not promulgated any procedures for issuance of Superfund administrative orders. It has fought in the courts for an interpretation of Superfund to allow it to avoid timely judicial review. In light of EPA's avoidance, it is necessary that the express procedural requirements set forth in S.1080 be written into the Superfund statute and expressly made applicable to key non-emergency decisions such as (1) selection of a remedial action, (2) issuance of an administrative order, and (3) waiver of the monetary or time limits on a "removal" action.

As important as Superfund's objectives are, there are many other objectives at EPA and other government agencies with equal or higher priority. Yet we required EPA in the Clean Air Act, for example, to follow detailed procedures that anticipated the reforms in the Administrative Procedure Act made by S.1080. And all other agencies live by the APA. EPA has given no reasons why CERCLA matters should be resolved without the meaningful public scrutiny required by the APA. Moreover, the greater the initial discretion given EPA, the greater the need for thorough and searching judicial review, as would be the case under the Bumpers Amendment, as introduced by you, Senator Bumpers and others on June 6, 1985. S.1256. With respect to administrative orders, it may be appropriate for the Committee to consider mandating issuance of some procedural regulations guaranteeing an opportunity to be heard. The Justice Department's suggestion in its testimony that the Committee might authorize such regulations is unnecessary since the authority exists already under CERCLA § 115.

2. What is the Bumpers Amendment regarding the scope of judicial review? Would applying this Amendment to EPA activities under Superfund help solve the problems regarding judicial review which you identified in your testimony?

The Bumpers Amendment, which the Administration endorsed in 1982 and which has passed the Senate a number of times, affirms that the judiciary is to give no special deference to agency interpretations of the law but is rather to retain absolute independence. To paraphrase the Judiciary Committee's Report on S.1080, it is designed to take the bureaucrats' thumb off the scale of justice and is especially necessary where, as here, a statute is vague and the agency wishes to maintain maximum discretion. Applying the amendment to EPA's activities under Superfund could go a long way in preventing the abuses in the administrative process identified in my testimony.

3. Are there any useful ideas coming out of this Committee's past work on regulatory reform that can be used to help improve EPA's administrative process under Superfund? Please explain how they would help.

In addition to (1) the "anti-evasion" provision, (2) application of S.1080's revisions to APA § 553 to key Superfund decisions, and (3) the Bumpers amendment regarding the scope of judicial review, all mentioned above, the regulatory reform proposal requiring preparation of an analysis assessing cost-effectiveness could be helpful in preventing EPA's selection of remedies under Superfund from becoming "gold-plated." The Superfund statute requires remedies to be cost-effective, but many have criticized the government's activities as overly wasteful. All these reforms would work to insure timely and meaningful public participation in EPA's processes.

4. Please describe what you mean by the "Superfund litigation nightmare" in your proposed statement?

The Act before you, the Superfund Act, has the noblest of goals, the cleanup of America's most serious abandoned hazardous waste sites. But the Act passed in 1980 has proven to be seriously flawed. Those Senators who were here in 1980 may recall the uneasiness accompanying those hurried hours in the lame duck session when this legislation was passed. Senators Stafford and Randolph, the bill's floor leaders, reported to the House after the vote that "only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matters of hours, that fragile coalition began to disintegrate to the point that . . . it would now be impossible to pass the bill again, even unchanged."

From hindsight, we now know that the Superfund Act, despite its laudable objectives, does not reflect the best that can be achieved by the legislative process. Court after court trying to interpret the Act has found it "marred by vague terminology and deleted provisions." The statute has become the very antithesis of the predictability which is essential to the functioning of a modern, complex economy. Two ambiguities in the Act have proven especially destructive of predictability: retroactivity and the "joint and several" standard. Although some of us, including myself, had thought that the compromise legislation drafted in 1980 eliminated any application of a new, disproportionate liability for past acts, EPA and the Justice Department apparently have thought otherwise. They have convinced some trial courts that what you had in mind was actually to create retroactive, joint and several standard without any limit on the backward reach into the past and without any requirement that the liability imposed should bear any relationship to a person's contribution to the potential harm. As I indicated in my testimony, the liability imposed can be so disproportionate to the conduct involved as to make Superfund a punitive statute that cannot pass muster under constitutional principles.

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The tragic reality of Superfund is that it is not producing the cleanup Congress intended. The principal

WASTE STREAMS SHIPPED BY IBM TO CONSERVATION CHEMICAL COMPANY-KANSAS CITY

	IBM FACILITY			
Waste	Boulder	Rochester	Lexington	Austin
Halogenated Hydrocarbons	X	X		
Non-Halogenated Hydrocarbons	X	X		
Electroplating Wastes	X	X	X	X
Heat Treating Salt Wastes	X	X	X	X
Metal Finishing Wastes	X	X		
Spray Paint Wastes	X			
Laboratory Wastes	X	X		
Degreasing Agents	X	X		
Acids-Alkalai	X	X		
Cleaning/Washing Agents				
Magnetic Tape Recording Head/ Disc Manufacturing Wastes	X			

The **Chairman**. And if you stand by a minute, Senator Simpson is coming and he wanted to ask you a few questions.

Mr. **Freeman**. Yes, sir.

The **Chairman**. I have just been informed that he will not be able to come and I have a few questions that Senator Simpson wanted answered. If you can respond to those just as quick as you can, we would appreciate it.

Mr. **Freeman**. Yes, sir.

[The following was received for the record:]

ANSWERS TO QUESTIONS
BY SENATOR SIMPSON
TO GEORGE FREEMAN

1. I keep hearing different explanations on the matter of litigation expenses. Would you discuss this matter from your perspective, with particular reference to the private sector legal expenses involved in recent EPA settlements, particularly the Chem-Dyne settlement.

In 1980, Congressman Harsha complained on the House floor that, if the ambiguous, hastily-drafted Senate compromise superfund bill was enacted, it would prove to be a "welfare and relief act for lawyers." 126 Cong. Rec. H11,791 (daily ed. Dec. 3, 1980). I fear that the last four years have proven him correct.

Until several years ago, the environmental practice in our firm largely centered on administrative law issues, where litigation was the exception, not the rule. Major issues of public policy under the Clean Water Act, for example, to the extent they had not been resolved by Congress, were resolved in EPA rulemaking. We frequently represented our clients in their participation in these rulemakings, often involving highly technical issues. We sometimes challenged EPA's final position in the courts of appeal. Once set, however, these rules, binding the agency, became the legal framework establishing the rights and obligations of all those seeking water permits. The regulated community adjusted its future practices according to the new prospective standards, and the role of lawyers in the process declined.

Under Superfund, however, our representation of clients is different. Typically, we represent a single client in connection with threatened or pending legal proceedings for a specific "problem" at a specific "site." Parenthetically clearing conflicts of interest has become a major problem for most law firms, and leads to many initial delays. While there have been some Superfund rulemakings, they have been few -- in fact the absolute minimum which the statute mandates. Although Superfund grants the President general authority "to promulgate any regulations necessary to carry out" the provisions of the Act, this authority is never used. CERCLA § 115. EPA has instead been establishing its Superfund policies and procedures through internal and informal "non-binding" policy guidance memoranda prepared outside the Administrative Procedure Act's processes. These policies are constantly in flux an instability which in and of itself raises the system's overal. costs unnecessarily.

While reducing the number of pages in the Federal Register on the Superfund program, this process ha. also shifted resolution of important policy questions from rulemaking into the more expensive and repetitive trial court adjudicative process. EPA and the Justice Department have implicitly been relying on the courts to provide the limiting principles governing their discretion which they have been unwilling to establish themselves by rule.

Additional litigation costs arise because of EPA's and Justice's attempts to minimize their own costs while ignoring the costs of its "regulated community" and the courts. EPA's studied indifference to the private sector's transaction costs, manifested in its unwillingness to apportion liability at Superfund sites it has investigated, has slowed settlement of EPA's claims and increased expenses.

A specialty sector of the private defense bar has now emerged, the "superfund lawyer," whose training and experience is negotiation/settlement and litigation, not administrative law. Many in this fraternity of "superfund lawyers" are headquartered in Washington, but they spend much of their time flying from the site of one Superfund negotiation to another. Like the "toxic torts" plaintiffs' bar which often "piggybacks" off of the Justice Department's suits to bring personal injury litigation at these sites, many in the "superfund" defense bar concentrate on the informal "settlement" system. But the system often benefits the lawyers and other intermediaries rather than the citizens and communities where these sites are or the companies caught in the litigation process.

While our firm is not directly involved in the Chem-Dyne settlement negotiations in Ohio, I have discussed the settlement with some of attorneys who were involved and with an analyst who has studied litigation costs at the site among others. Chem-Dyne is one of the cases upon which Putnam, Hayes, and Bartlett's conclusion that total litigation costs at superfund sites would exceed 55 percent of direct cleanup costs if litigation costs continued at present levels is based.

The Chem-Dyne settlement was delayed for many months because of a failure to come up with an allocation formula for deciding what percentage each party should contribute to settlement. A number of attorneys at Chem-Dyne, sobered by the experience, have encouraged such organizations as Clean Sites, Inc., and the Center for Public Resources to develop an equitable cost allocation procedure to be used early in the settlement process at Superfund sites. As a rule, EPA refuses to allocate costs among parties or to negotiate agreements with individual defendants at these sites, forcing defendants to organize and negotiate an allocation among themselves before the settlement process can proceed. Mr. Thomas in his testimony on June 7 candidly admitted that EPA had abandoned its earlier attempts to pursue only "fair shares." But, in my view, if EPA were forced to allocate costs administratively and to make a settlement offer to each defendant based on his allocated fair share (including the granting of a complete release upon payment of his assigned share), many more Superfund cases would be settled and also settled more expeditiously, particularly if true releases would be granted (those that leave the Fund contingently responsible for EPA's errors of judgment in specifying or approving clean up plans).

2. Could you please enlighten us on the matter of releases from liability after cleanup, with particular reference to the situation that arises where parties remain liable after government-ordered disposal at a federally-permitted RCRA facility?

It is a rare case where the government now could order disposal of wastes at a federally-permitted (as opposed to interim status) RCRA facility. Where government-ordered disposal occurs at a RCRA facility, governmental resistance to granting a complete release would appear indefensible. Most businessmen probably assume that transfer of properly labeled wastes to a permitted facility absolves them of liability for accidents at that facility which they would otherwise have, for example, if they transferred the waste to an illegal dumpsite. Exemption from liability for those who send their waste to a permitted site would serve as an incentive to compliance with RCRA's manifesting and labeling requirements and would encourage proper disposal. Government refusal to release a Superfund defendant from liability who sends his waste to a RCRA permitted facility as instructed can only mean that the government lacks faith in its own regulatory processes for preventing releases at sites it permits. Perhaps the government should itself insure the financial viability of its permitted facilities or run the facility itself in order to prevent accidents. Failure to provide a real release from liability surely discourages settlement.

3. How significant is the fact that parties who disposed with legal permits from states and localities before CERCLA passed in 1980 are now being held liable for clean up? Might this be a good use of Superfund monies contributed by industry?

Although the government argues in litigation that such persons are liable for cleanup, that the statute creates strict, retroactive liability, no judgments have yet been rendered in the context described, to my knowledge. However, in preliminary rulings on defendants' motions to dismiss or for summary judgment, the government's interpretation has prevailed on some occasions. E.g., U.S. v. South Carolina Recycling & Disposal, Inc., 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. Feb. 23, 1984). In others, the matter has been deferred. U.S. v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1912 (C.D.Cal. Apr. 5, 1984). In still others, it has been rejected. E.g., Nunn v. Chemical Waste Management, Inc., 22 Env't Rep. Cas. (BNA) 1763 (D.Kan. Mar. 4, 1985) (CERCLA not retroactive).

In my view, the best interpretation of CERCLA is that Congress did not intend to hold parties liable whose activity prior to CERCLA's enactment did not violate any standard of federal or state law existing at the time the parties acted.

See Appendix A to my statement. The Superfund was created to pay for cleanup at sites where no truly "responsible" (i.e., legally liable) party exists. It could become very important if the classes of parties you mention begin to be held retroactively liable because, in that event, the statute may be subject to a successful constitutional challenge.

4. Hank Habicht said that small contributors who are "deep pockets" are not being sued by the Government under strict, joint and several standards. Has this been your experience?

The Government sends "notice letters" demanding complete cleanup indiscriminantly, to large and small contributors alike, whether or not they have "deep pockets." Recently, EPA has begun sending "requests for information" along with these notice letters, demanding information about the target's financial status, including the availability of insurance to pay any judgment. While our firm does represent some small contributors which the Government has sued, plaintiffs other than the United States appear more willing to sue small "deep pocket" contributors. In one case, a state did not even allege our client to have anything to do with the arrangements leading to disposal at the cleanup site. The trial judge nevertheless held that such defendant may be liable under Superfund. Missouri v. Independent Petrochemical Corp., 22 Env't Rep. Cas. (BNA) 1167 (E.D.Mo. Jan. 8, 1985). In another, a private plaintiff attempted to sue an out-of-state corporation whose in-state subsidiary waas an alleged generator. The court, however, dismissed the out-of-state defendant for lack of personal jurisdiction. Wehner v. Syntex Agribusiness, Inc., 22 Env't Rep. Cas. (BNA) 1732 (E.D.Mo. Apr. 1, 1985). In still another case, the City of New York has brought a superfund suit to clean up its landfill, even though the illicit disposal resulted from one of its own employees' dealings with organized crime. It will be interesting to see how the Justice Department responds to the question posed at the June 7 hearing about why it selected IBM as one of four initial targets in the Chem-Dyne site.

The CHAIRMAN. Thank you very much. I want to express my appreciation to you for coming and testifying and I am sure it will be a fine addition to the record.

Mr. FREEMAN. Thank you, sir.

The CHAIRMAN. Now, Ms. Janet Hathaway, would you come around, please?

Would you want to take 5 minutes, Ms. Hathaway, and make an opening statement?

Ms. HATHAWAY. Yes, thank you.

The CHAIRMAN. And then we can put your entire statement in the record, if you want.

STATEMENT OF JANET S. HATHAWAY, STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH, WASHINGTON, DC

Ms. HATHAWAY. Mr. Chairman, members of the committee, I am Janet Hathaway, staff attorney with Public Citizen's Congress Watch. Congress Watch is a legislative branch of a consumer organization founded by Ralph Nader in 1971, Public Citizen.

The testimony I am giving today is endorsed by members of a public interest Superfund coalition, including Sierra Club, National Audubon Society, Natural Resources Defense Council, Citizen Action, Environmental Action, Environmental Defense Fund, U.S. Public Interest Research Group, the Consumer Federation of America, the United Steelworkers of America, and the Industrial Union Department of the AFL-CIO. The National Wildlife Federation is sending supplemental views to the committee, but in general endorses the testimony as well.

On one point, I would like to point out a divergence of opinions in the environmental groups. Sierra Club, National Audubon Society, Environmental Defense Fund and NRDC support the judicial review provision in the current statute and, in particular, believe that exclusive jurisdiction for the review of regulations should reside in the D.C. Circuit Court of Appeals. They vehemently oppose the changes of review in S. 51.

Public Citizen and other coalition members regard the current statutory provisions as preferable, but do not oppose the review sections of S. 51.

On other matters covered in my testimony, these diverse public interest groups are in agreement. Because my time for a statement is so limited, I would like to confine our discussion to questions of liability.

The central question in the reauthorization of Superfund, as I see it, is how can Congress ensure that private parties become a strong new force in battling the over 20,000 hazardous wastesites that blight our countryside and threaten our groundwater supplies.

We believe that the best way to motivate private parties to clean up waste sites is the strong liability provisions that are now in the statute—liability which is strict, joint, and several.

The insurance industry has suggested drastically restructuring the Superfund. Unfortunately, the structure that the industry seeks would gut the program of the incentives that parties now have to negotiate and clean up without first being identified by EPA and pursued.

The insurance proposal would also reward socially irresponsible companies who have obstructed cleanups and refused to ante up their fair share at waste sites. The surest way to cripple the program is to eliminate or weaken strict, joint, and several liability.

Certain proposals which purport to improve the fairness of joint and several liability would impose a mandatory apportionment scheme on the courts or EPA. Significant settlements are occurring at complex, multiple-party hazardous waste sites. A consent decree finalizing the settlement at Chem-Dyne waste site near Hamilton, OH, was expected to be filed in June. This settlement will bring in some $19 million for cleanup and involve some 172 companies.

The Westinghouse settlement for between 75 and $100 million for the cleanup and incineration of PCB's in the vicinity of Bloomington, IN, is also illustrative of recent settlements accomplished under Superfund.

Conservation Chemical, an enforcement action concerning a 220-defendant waste site near Kansas City, MO, is yet another multimillion-dollar cleanup case that is reputed to be very close to settlement.

Under the current law, once a company has been identified as a potentially responsible party at a site, it has a heavy incentive—the desire to avoid being held liable for potentially all the costs of cleanup—to document everything it knows about what it contributed or any other company contributed to the waste site in question. This is why multiple millions of dollars are being collected in settlements.

If there were a mandatory apportionment scheme, a company would be liable only to the extent the Government could prove its degree of involvement. Under such circumstances, it would be advisable for the company to volunteer nothing, to reveal only what is strictly required by the law.

The worst that would happen to a recalcitrant company is that it would have to shoulder its actual share of the cleanup costs. The best result from its perspective is that it would have to pay nothing. Surely, the resulting game of hide-and-seek would impede cleanup of dangerous hazardous waste sites.

Apportionment of damages is an equitable power of the courts today, and courts have indicated that they would be willing to exercise apportionment in appropriate cases. For example, in the *Stringfellow, Wade, and Chem-Dyne* cases, the courts have noted that apportionment is appropriate in cases where it can be indicated where a reasonable share of the costs ought to go between the various defendants.

Finally, the liability modifications which have been suggested by Mr. Freeman sound, on first blush, plausible, but we have had a real-world test of their viability in addressing hazardous waste sites. They did not work then, and they will not work now.

Simply put, these proposals were the Superfund principles espoused by Rita Lavelle. Surely, that sorry chapter in the history of EPA should be closed once and for all.

Thank you. I will be happy to answer questions on my testimony.

[The prepared statement follows:]

STATEMENT BY

JANET S. HATHAWAY
STAFF ATTORNEY, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman, and Members of the Committee:

I am Janet Hathaway, staff attorney with Public Citizen's Congress Watch. Congress Watch is the legislative research and advocacy branch of Public Citizen, a consumer organization founded by Ralph Nader in 1971.

I thank you for the invitation to testify before the Judiciary Committee on judicial issues crucial to the reauthorization of Superfund. For nearly two years, Congress Watch has worked closely with an informal coalition of environmental, labor, and public interest organizations to ensure that the federal hazardous waste cleanup program is reauthorized and strengthened before it expires in October of this year. I understand that the referral which the Judiciary Committee obtained by unanimous consent constrains the time available to explore the many important topics, and for that reason I have been asked to represent the views of all members of the informal coalition. I believe that most of my comments will reflect the views of most or all of the coalition members. However, I have urged other coalition members to submit written comments on any topics which they feel I have incompletely discussed or on any point where the groups take divergent views.

I. LIABILITY UNDER CERCLA

Although the Committee's referral does not specifically cover the Superfund liability standard, the Committee staff has made it clear that the Committee is vitally interested in the liability provision. Indeed, the liability standard is at the heart of the Superfund cleanup program. S. 51, as reported by the Committees on Environment and Public Works and Finance, does not modify the liability standard in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Public Law 96-510. The statutory language resulted from compromises occurring late in the 1980 lame duck session, and as such is less than perfectly clear. However, the courts have consistently interpreted the law to establish liability without the necessity of proof of the defendants' negligence ("strict liability"). Courts have also held that any defendant who contributed to the hazardous substance site can be liable for the full costs of cleanup ("joint and several liablity"). At first, many court challenges were filed by disgruntled defendants who felt that the courts would not uphold the rigorous liability standards. But the courts have consistently ruled that the government's efforts to recover costs expended from the Superfund will be governed by principles of strict, joint and several liability. The liability principles have been a major incentive for private party cleanup.

A. Strict Liability under Superfund

Certain activities are so dangerous that even when care is taken, injuries to people and damage to property are likely to result. The common law has imposed special obligations on those involved in such "abnormally dangerous" activities. As a matter of social policy, some of these activities are restricted or banned outright. Other dangerous activities are allowed, but only where those responsible pay the full costs of doing business, including the costs to the community in terms of environmental degradation and adverse health effects. One method of providing incentives for extreme caution and full compensation to those injured by abnormally dangerous activities is the imposition of strict liability.

Under strict liability principles, a defendant is responsible for all damages caused to others by the activity even if the injured plaintiff cannot prove that the defendant acted carelessly or unreasonably. In other words, negligence need not be shown. The plaintiff must show only that the defendant's abnormally dangerous activities caused the plaintiff's harm.

Strict liability is by no means unique to the Superfund or the hazardous waste context. Dean William Prosser, the noted authority in tort law, states, "The storage in quantity of explosives, or inflammable liquids, or blasting, or the accumulation of sewage, or the emission of creosote fumes, or pile driving which sets up vibration, all have the same element of the unusual excessive and bizarre, and have been considered "non-natural" uses, leading to strict liability when they result in harm to another."[1] Other classic examples of abnormally dangerous activities, for which strict liability is imposed, are fumigation, aerial spraying of pesticides and manufacturing of explosives.

Many sponsors of the 1980 Superfund Act believed that generation and disposal of hazardous substances are similarly "abnormally dangerous" activities. They believed courts, in keeping with common law trends, would impose strict liability, even if the Act did not explicitly instruct courts to do so. The definitions of the terms "liable" and "liability" at section 101 (32) of Superfund, (codified at 42 U.S.C. §9601 (32)), refer to the liability standard under section 311 of the Clean Water Act (33 U.S.C. §1321). At the time of Superfund's enactment, section 311 had been interpreted to impose a strict liability standard.[2] Since 1980, in those few cases that have discussed the issues strict liability has been imposed under the Superfund law.[3]

B. Joint and Several Liability under Superfund

The principle of joint and several liability permits a plaintiff to recover the entire amount of damages from any liable defendant when there are multiple actors who have contributed to an indivisible harm suffered by the plaintiff. The policy justification for this rule is that as between an injured plaintiff and multiple liable defendants, the burden of apportioning damages is more fairly borne by the defendants. It is the defendant, after all, who has or can obtain detailed evidence about his or her behavior. Discussions between the defendants should more swiftly and fairly allocate the proper burden each defendant should share than requiring the plaintiff to identify the degree of harm contributed by each defendant.

Under common law, if the defendant's behavior is a substantial factor in causing the plaintiff's harm, the defendant is liable for all consequences proximately caused by his wrongful act; i.e., the total costs. Even if the consequences are especially severe or unexpected, like adverse reactions to certain drugs or chemicals, the defendant may nevertheless be fully liable to the plaintiff for the entire damages. Because the risk posed by toxic substances such as arsenic, benzene or asbestos is clearly not an idiosyncratic reaction of the injured person, and because the damage is potentially severe, those engaged in the manufacture, use, transportation and disposal of these substances should be on notice that if their efforts to protect the public prove insufficient and harm ensues, they will be forced to pay for the full costs to the plaintiff. Questions of reimbursement from other contributors to the problem are, and should be, dealt with secondarily by the defendants themselves.

The traditional rule is that joint and several liability will be imposed where multiple parties contribute to an indivisible harm. If there is an evidently reasonable method of allocating damages, the courts will not hold the defendants jointly and severally liable. However, where a hazardous substance release contaminates ground water or exposes a community, it is usually extremely difficult to isolate the harm contributed by each polluter. In numerous pollution cases, both before and after the enactment of Superfund, courts have decided that a plaintiff's recovery should not depend on the plaintiff's ability to identify the specific harm contributed by each defendant.[3a] Furthermore, it is unfair for the innocent plaintiff to be forced to bear the risk of the defendants' insolvency or irresponsibility. Rather, most courts have ruled that distribution of the damages is a problem best left to the defendants in suits for contribution. The plaintiff can recover the total damages from any one of the parties found liable. The paying defendant may then seek contribution or indemnification from other liable parties.

Since the passage of the Superfund Act in 1980, a significant amount of dispute and litigation has focused on whether joint and several liability should be applied when EPA and Justice Department seek cost recovery from those responsible for hazardous waste sites. The courts have agreed that the harms caused by hazardous substance releases and leaking waste sites are such that divisibility of the harm is practically difficult even where not theoretically impossible.[4] Joint and several liability has been imposed for cost recovery actions, where defendants have failed to meet their burden of demonstrating the divisibility of the harm.[5] In interpreting the Superfund Act to allow for the imposition of joint and several liability in appropriate cases, some courts note that "liability" in Superfund is defined by reference to section 311 of the Clean Water Act, which has also been construed to allow joint and several liability.[6]

Some have suggested that the liability standard under Superfund has spawned excessive litigation.[7] Public Citizen together with other public interest, environmental and labor groups, disagree. There are indeed ambiguities in the 1980 statute. Superfund, like many controversial new laws, was subjected to court challenge by many chemical and insurance companies which hoped to escape the full costs incurred because of their hazardous waste disposal practices. The court decisions have provided necessary clarification of key liability provisions, which are now less likely to fuel continued disputes.

Although some companies will continue to obstruct cleanups, many are opting to negotiate their shares and to initiate action at sites where they dumped toxics. Voluntary settlements are occurring at long last only because responsible companies fear that delays will increase their total costs. Companies seeking to avoid paying for cleanups recently have received court orders amounting to an ultimatum: either pay for a complete cleanup now or pay much more later. This weapon would no longer be available if the insurance industry is successful in its current lobbying blitz to eliminate the liability provisions in the Superfund law.

The insurance industry suggests a "totally restructured" Superfund.[7a] Unfortunately, the structure the insurance industry is seeking would reward socially irresponsible companies who have refused to ante up their fair share of the costs of cleanups.

The insurance proposal for "restructuring" the Superfund would eliminate the government's authority to sue companies responsible for toxic waste sites to force them to clean up or pay. Instead, the insurance industry would convert the program to a massive public works project. The history of cumbersome, costly public works projects has seldom inspired accolades from private industry, except where it is the direct beneficiary of the project.

The liability provisions are among the law's few effective incentives for rapid and complete cleanups. Without the prospect of liability for the full costs of cleanup, nobody but an altruist would volunteer to clean up old toxic dumps. But a company facing liability for cleanup costs, which grows exponentially when delays permit hazardous substances to migrate into groundwater, has a weighty incentive to respond as quickly as possible.

The insurance industry has much to gain from legislation to undercut the Superfund liability provisions. Chemical companies, particularly those which have resisted paying their fair shares for averting the public health threats posed by toxic dumps, also stand to benefit. But the public will see even less progress at Superfund sites if the insurance companies are successful on Capitol Hill. Unless companies responsible for dumping toxics fear the escalating costs associated with postponed cleanups, hazardous waste sites will be ignored until a catastrophy compels attention.

C. Mandatory Apportionment Schemes

The surest way to cripple the program is to eliminate or weaken strict, joint and several liability. Certain proposals which purport to improve the fairness of joint and several liability would impose a mandatory apportionment scheme on the courts or on the government. Adoption of such proposals would severely undermine joint and several liability.

Currently, multiple defendants who may be held liable for the totality of response costs have strong incentives to negotiate with EPA, Justice and co-defendants for the appropriate shares to be borne by each defendant.

Significant settlements at complex, multi-party hazardous waste sites, are occuring. A consent decree finalizing a settlement concerning the Chem-Dyne waste site near Hamilton, Ohio is expected to be filed in June.[8] The Chem-Dyne site involved 172 companies, and the settlement is expected to bring in $19 million. The Westinghouse settlement for between $75 million and $100 million to clean up and incinerate polychlorinated biphenyls (PCB's) in the vicinity of Bloomington, Indiana is also illustrative of recent settlements accomplished under Superfund.[9] Conservation Chemical, an enforcement action concerning a 220-defendant waste site near Kansas City, Missouri, is another multi-million dollar cleanup case that is reputed to be very near to settlement.

A mandatory apportionment scheme would require a court, EPA or Justice Department to establish the share of costs which each defendant would be required to pay. Many of the factors are ones commonly used now by the defendants and EPA in negotiating settlements: volume and toxicity of wastes, involvement at the site, degree of care, degree of cooperation with authorities, etc. The difference is that under the law as it is now applied, the defendants bear the burden of establishing these factors. This is a sensible approach, given the fact that the relevant documents and witnesses are usually controlled by the defendants. To reverse the burden, placing it on the government or the courts, would entail substantial delays as the process of discovery drags on. But worse, it would be in no company's best interests to reveal what it what it knows both about its contribution of hazardous wastes or about other companies' involvement at the site.

Under the current law, once a company has been identified as a potential responsible party at a site, it has a heavy incentive--the desire to avoid being held liable for potentially all costs of cleanup--to document everything it knows about the wastes it (or any other company) contributed to the site. If there were a mandatory apportionment scheme, the government or the court could hold a company liable only to the extent the government established the degree of involvement by the company. Under such circumstances, it would be advisable for the company to reveal only what it might be required by law to reveal, but to volunteer nothing. The worst that would happen to a recalcitrant company is that it would have to shoulder its actual share of cleanup costs. The best result, from its perspective, is that the government would fail to establish the company's share, and it would be off free. Surely the resulting game of hide-and-seek would impede the cleanup of dangerous hazardous waste sites.

Apportionment of damages is an equitable power which courts may exercise in appropriate cases under the law as it stands. As Prosser says, "Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made."[10] The cases thus far under Superfund indicate that courts are willing to apportion damages.[11]

D. Does CERCLA Impose Absolute Liability?

Some industry representatives have argued that the liability imposed under the Superfund Act is not merely strict, but absolute liability. They claim that the government need not prove a causal connection between the defendants' hazardous wastes and the contamination for which EPA and Justice seek abatement or cost recovery. This is not a fair characterization of the statute.

The statute at section 107 establishes the liability for removal, remedial action or necessary costs of response of: (1) owners and operators of facilities, (2) persons who owned or operated facilities at the time of hazardous substance disposal, (3) persons who contracted or arranged for hazardous substances to be transported for disposal or treatment, and (4) persons who accepted hazardous substances for transport to disposal or treatment facilities. Section 104 defines the scope of response authorities, and section 105 requires the publication of a national contingency plan (NCP) to "establish procedures and standards for responding to releases of hazardous substances, pollutants and contaminants, . . ."[13] These sections limit the liability of defendants to costs of removal, remedial action or response consistent with the national contingency plan.[14]

Thus, there are constraints on the costs for which a defendant will be held liable, which are only those costs incurred as a result of a release or threatened release of hazardous substance "to remove or arrange for the removal of, and provide remedial action relating to such hazardous substance, pollutant, or contaminant . . . .[15] The requirement of a causal connection between the defendants' hazardous substances and the response action costs, while not explicit in the statute, is implicit in the operation of sections 104, 105 and 107.

Courts have been aware of the need for a causal nexus between defendants' hazardous substances and the response action costs. The case that many industry representatives consider the most onerous, United States v. Wade,[16] in fact does not ignore the need for a causal nexus. The government in the Wade case admitted that an essential element of its case was to demonstrate that defendants' hazardous substances in fact were disposed at the Wade site. However, the government's experts acknowledged that scientific techniques are not available to positively identify the manufacturer of a specific hazardous substance found at a waste site.

Although the government may know that the generator dumped PCBs at a waste site, and it identifies that PCBs are migrating from the dump, industry wanted the court to require the government to prove whose PCBs in fact were creating contamination. The usual multi-party waste site case involves many people dumping generically similar substances which are mixed together as barrels rust and liquids seep through soils. To "fingerprint" wastes which are now part of a toxic soup would impose an extremely onerous burden on the government.

The Wade court stated, "Generators are adequately protected by requiring a plaintiff to prove that a defendant's waste was disposed of at a site and that the substances that make the defendant's waste hazardous are also present at the site."[17] The government is thus required, even by the court with the most sympathetic reading to date, to prove a causal nexus between defendants' disposal of hazardous substances and the waste site problem. Government is not required to "fingerprint" or to positively identify who manufactured any particular sample of wastes found at the site.

The government is required to prove both that a defendant disposed of a hazardous substance and that the kind of hazardous substance defendant disposed is part of the contamination necessitating response. This hardly amounts to absolute liability.

II. CONTRIBUTION

S. 51 establishes a right of contribution at section 126 for defendants who believe they have paid a disproportionate share of the total costs of response. CERCLA provided no explicit right for defendants to sue others for contribution, and industry representatives suggested that the courts would be unlikely to imply a right of contribution under the statute without clear directives from Congress. However, a right of contribution under CERCLA was found in one recent case.[18]

The public interest groups agree that it is fair and appropriate for defendants who have paid more than an equitable share as a result of a judgment or settlement to be able to sue other parties who have contributed to a hazardous substance release under the statute. We are also concerned that the right of contribution be structured in a way that will not lead to undue delays in cleanup cases and will not deter settlements. We feel that section 126 has struck an appropriate balance.

A. Timing of the Contribution/Indemnification Claim

Section 126 provides that defendants may bring contribution or indemnification claims only after entry of judgment or date of settlement in good faith. The goal is the efficient management of litigation. In some cases, the government may choose to sue the major contributors to a waste site but not some minor contributors. The original defendants may wish to seek contribution from the minor contributors, but the joinder of numerous small generators may unnecessarily complicate or delay the original suit. In such cases, it is appropriate for the contribution action to be postponed until settlement or judgment of the original action.

Rule 19 of the Federal Rules of Civil Procedure concerns the ability to join persons in a suit who are needed for just adjudication of claims. The rule establishes that the indispensable person shall be joined if (1) in the absence of the person complete relief cannot be accorded among those already parties, or (2) the absence may impair or impede the ability of the absent person to protect certain interests or "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

Although the government may actually bring few waste site cases in which indispensable persons are not named as original defendants, such cases could arise. The language of S. 51 would not on its face prevent joinder of parties who would be deemed indispensable under Rule 19. Where the issues raised by the original party wishing to join an absent defendant extend beyond questions of contribution, and, for example, might provide a defense to an original party, joinder may be permitted without conflicting with section 126.

The Committee Report from Environment and Public Works states,

> "This provision is intended to postpone counterclaims, cross-claims, and third party actions; parties with counterclaims deemed compulsory under the Federal Rules of Civil Procedure shall pursue such claims after completion of the case-in-chief. This postponement allows the government to limit the number of parties and claims in its actions, so that litigation may be resolved in a more efficient and expeditious fashion."[19]

This report language ensures that counterclaims, cross-claims and third party actions will not be barred by failure to bring those claims in the original action. Enhancing the expeditious settlement or judgment of original claims is highly desirable, and has been by section 126 achieved without sacrificing the rights of parties to subsequently pursue claims of contribution or indemnification.

B. Improved Incentives for Settlement

Section 126 at new section 107 (l)(3) adds a section to the statute which will help encourage settlement:

> "When a person has resolved its liability to the United States or a State in a judicially approved good faith settlement, such person shall not be liable for claims for contribution under paragraph (2) of this subsection regarding matters addressed in the settlement."

This provision is designed to ensure that defendants will not be reluctant to enter into settlements because of fears that co-defendants will continue to pursue them for contribution. The amendment will increase the finality, and therefore the attractiveness, of settlements.

Section 126 also encourages private party settlements by allowing those who settle to recover some of the costs from persons liable under Superfund who were not parties to the settlement. Prosser notes that statutes in several states prohibit those who settle from seeking contribution, and limit the right contribution to those against whom judgments have been rendered, which fix both liability and amount.[20] So long as the settling parties are required to establish the amount of damages and the reasonableness of the settlement in a subsequent action for contribution, S. 51 does not appear to encourage unreasonable settlements.

III. JUDICIAL REVIEW

Section 132 of S. 51 modifies CERCLA's judicial review provisions.[21] The bill would allow review of regulations promulgated under the Superfund in any federal court of appeals for the circuit in which the appellant resides or transacts business. Currently, only the U.S. Circuit Court of Appeals for the District of Columbia has jurisdiction to review Superfund regulations. The bill would also expand the period for filing for review from ninety to one hundred and twenty days.

The purposes of the current statutory provision are to create a single court which will develop expertise in Superfund matters and to avoid conflicting interpretations which may result from review in the various circuits. These purposes have been served by the statute, but some have argued that restricting review to the D.C. Circuit is inconvenient to appellants residing elsewhere. Although those who seek review may not reside at a convenient distance from the courthouse where review will occur, there often is no major inconvenience for parties who may retain counsel more closely situated. However, if inconvenience to parties has resulted from review of regulations occuring exclusively in the District of Columbia Circuit, Public Citizen has no objection to the modification provided by section 132.

If there is to be an expansion of review jurisdiction to other circuits, it is important to include mechanisms to avoid, to the extent possible, the "race to the courthouse" problem. The mechanism provided in S. 51 is to require the Administrative Office of the United States Courts to randomly select which court, of those in which filing has occurred, will review the agency action. Because this random selection procedure is tempered by the power of the reviewing court to transfer an application "for the convenience of the parties or otherwise in the interest of justice," Public Citizen believes that such a procedure will adequately protect the parties.

Public Citizen also approves of the extension of the period of filing to 120 days. We agree with the statement in the Environment and Public Works Committee Report,

> "In view of the seriousness of the possible consequences of a failure to challenge an action of the Administration within the prescribed time period, persons who will be directly affected by a regulation should have ample opportunity to assess the consequences of such regulation and file an application for review."[22]

We feel that 120 days will be an adequate, but not unduly protracted, filing period.

IV. PRE-ENFORCEMENT REVIEW

Section 133 of S. 51 adds two new subsections to the judicial review provisions at section 113 of the CERCLA statute.[23] The first section clarifies the statute to ensure that challenges to response actions selected under section 104, or abatement orders issued under section 106, are not allowed to delay cleanup. Rather, such challenges would be heard when the government brings action to enforce the order or to seek recovery of response costs. This clarification is in keeping with principles of administrative law designed to balance the competing interests favoring timely review of agency action and orderly execution of congressionally-mandated agency duties.[24]

This balance is crucial, and tinkering may disrupt the fragile equilibrium which is now achieved.

A. The Timing of Review of Administrative Orders

Public Citizen and other public interest organizations advocate the preservation and enhancement of opportunities for public comment and informed participation in all stages of the Superfund process--from the identification of sites, investigation, ranking, proposal and selection of response action, to the implementation of the response plan. Extremely important to the success of this process is the availability of judicial review of final agency actions, including section 104 or 106 orders. However, the review of agency decisions should not hinder swift cleanup of dangerous releases of hazardous substances.

Courts in some instances have been asked to halt a response action while parties subject to cleanup orders attempt to demonstrate to the court flaws in the agency action. Not surprisingly, courts have generally denied injunctive relief delaying cleanup.[25] Injunctions may be granted in cases where restraining an action is deemed necessary to prevent great or irreparable harm, where pecuniary compensation would be appropriate or would be extremely difficult to ascertain, and in other unusual circumstances.[26]

Public Citizen believes that EPA and Justice are correct to oppose injunctions requiring cleanup action to be interrupted pending review of the orders. Seldom will irreparable harm result if cleanup proceeds and review is completed later. However, Public Citizen and other groups in the public interest coalition are not wedded to any one mechanism for minimizing disruptions of cleanup work while preserving the opportunity for review. Section 133 of S. 51 provides one such mechanism.

Section 133 also establishes a procedure for potentially responsible parties to seek reimbursement from the Fund for costs incurred because of compliance with an order. Because potentially responsible parties can recover response costs plus interest in appropriate cases, the burden of postponing review of orders is significantly mitigated.[27]

B. The Scope of Judicial Review and Standard of Review

Section 133 of S. 51 also makes explicit that review of Superfund response actions will be limited to the administrative record and that the selection of response action shall be upheld unless the court finds the decision "arbitrary and capricious or otherwise not in accordance with law." The arbitary and capricious standard is commonly applied to review agency actions other than agency hearings under section 556 and 557 of the Administrative Procedure Act[28] or under express statutory mandate. Courts are likely to interpret the statute to provide review by this standard on the basis of the administrative record even in the absence of amendment in S. 51. Public Citizen does not seek to modify either the scope or the standard of review.

More troublesome is the language in S. 51, section 133 at new section 113(g):

> "The only objection which may be raised in any such judicial action under section 106 or 107 [concerning the adequacy of response action taken or ordered] is an objection to the response action which was raised with reasonable specificity to the President during the applicable period for public comment."

The language is designed to restrict review only to issues clearly raised in the public comment period. New evidence pertaining to liability of the parties or appropriateness of the response action may emerge after the comment period, despite diligent efforts of the parties to identify all appropriate issues. Courts should retain the discretion to admit significant new evidence bearing on issues not raised earlier in a narrow range of cases. To preclude courts from hearing any new issue on appeal may "expedite the process of review"[29] but may detract significantly from the court's ability to justly adjudicate.

V. CITIZEN SUITS.

Section 138 of S.51 would establish a citizen suit provision under CERCLA. Eleven federal environmental laws now contain such provisions.[30] However, there currently is no right for affected citizens to sue to enforce provisions of CERCLA and regulations promulgated under the Act. A citizen suit provision is crucial to ensure that violations of the Act or of regulations, which Justice Department overlooks or is unable to devote enforcement resources to, are not continuing unabated. Particularly when government enforcement resources are insufficient to meet the massive challenge posed by some 20,000 hazardous waste sites, citizen suits provide a desirable augmentation of enforcement efforts. Public Citizen together with a wide range of environmental, labor and citizen groups strongly advocate a citizen suit provision under Superfund.

The citizen suit language in S.51 is narrower than that provided in the recently-enacted amendments to the Resource Conservation and Recovery Act of 1976, Public Law 98-616. The 1984 RCRA amendments include a citizen suit section allowing persons to sue to anyone whose "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[31] No comparable authority is granted in S.51, despite the fact that the RCRA "hazardous waste" definition includes only a minor subset of the over 700 "hazardous substances" designated under CERCLA.[32] Public Citizen supports a Superfund citizen suit provision permitting action against persons whose past or present generation, storage, treatment, transportation or disposal of hazardous substances poses an imminent and substantial endangerment.

The Superfund citizen suit section in S.51 permits suits against any person "alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act," or against the government "for failure to perform any act or duty under this Act which is not discretionary . . . ." The section provides no opportunity for citizens to sue for money damages. The purpose, instead, is to ensure that agencies carry out the Congress' mandates and that violations of the law are halted.

Some argue that citizen suit provisions result in excessive and unjustified litigation. Evidence does not support this claim. The Environmental Law Institute (ELI) was commissioned by the U.S. Environmental Protection Agency[33] to study citizen enforcement actions under EPA-administered statutes. According to the analysis by ELI, total actions under the Clean Water Act, the Clean Air Act, RCRA, the Toxic Substances Control Act and the Safe Drinking Water Act from 1978 through March 30, 1984 totalled 349. Of these, 160 consisted only of notices, and 189 involved the filing of lawsuits. The majority of actions were brought under the Clean Water Act (236 total; 113 notices and 123 suits). The seven other statutes accounted for only 113 actions over the six and one-half year period, with 47 notices and 66 lawsuits.[34] This hardly constitutes a flood of litigation.

One major deterrent to the bringing of citizen suits is, obviously, the expense. Environmental Law Institute reported, "Despite statutory authorization for recovery of attorneys' fees by victorious plaintiffs, citizen group representatives repeatedly noted the great difficulty they had in paying the 'up front' costs of these lawsuits."[35] ELI found the average reported litigation cost among some two dozen individual plaintiffs bringing citizen suits between $35,000 and $40,000. The lowest reported figure was about $4,000 and the highest was approximately $200,000. [36] These costs are obviously beyond the means of most individuals and some national organizations. The costliness is, unfortunately, likely to deter even meritorious cases.

Another reason why the numbers of citizen suits have been fewer than anticipated is difficulty, in many instances, of documenting statutory violations. Statutes establishing broad authorities but creating few mandatory duties, like CERCLA, are unlikely to spark numerous citizen suits. Even where statutes or regulations do impose mandatory duties, it is the rare regulation which requires periodic compliance reporting from industry, which then allows the interested public to identify violations. One of the reasons suggested for the fact that more than half of citizen suits actions were brought under the Clean Water Act is the ready availability of industry-submitted compliance data, which enables a potential plaintiff to easily identify violations. Such industry self-reporting occurs seldom with abandoned hazardous waste sites. Industry documentation of statutory violations is therefore not likely to be a common basis for CERCLA citizen suits.

Government enforcement bars citizen suits under the proposed CERCLA provision as well as under most other environmental laws. Concern has been raised that citizen suits could hinder or complicate government action. To allay these fears, the CERCLA citizen suit provision requires a ninety day waiting period after the plaintiff provides notice to the appropriate state or federal governmental official and to any alleged violator before the plaintiff may bring suit. S.51 prohibits any action from being pursued if the federal or state government "has commenced and is diligently prosecuting an action under this Act or the Solid Waste Disposal Act to require compliance with such standard, regulation, condition, requirement or order."[37] This prohibition is made less onerous by a limited right for affected citizens to intervene, except where the President or the State shows that the citizen's interest is adequately represented by existing parties.[38] To ensure that federal and state interests are adequately represented and protected, section 138 of S. 51 enables the United States or the State to intervene as a matter of right in any citizen suit case.[39]

Certain opponents of citizen suits have alleged that suits are frequently brought for trivial violations. Analysis by the Environmental Law Institute reveals no such problem.

> "None of the government enforcement personnel interviewed reported a general tendency for citizen groups to pursue trivial violations (a complaint frequently raised by industry spokesmen) . . . . Every government enforcement person interviewed acknowledged that some of the cases initiated by citizen enforcers had slipped through the state-federal enforcement net, and should have been the subject of government enforcement action. Most citizen suit cases, therefore, were acknowledged to be either 1) cases which EPA would have initiated in the normal course, or 2) cases which were 'enforcement worthy' but were not high on EPA's priority list."[40]

This is not to say that citizen suits are never brought for trivial violations, nor still less that such suits are always meritorious. Any category of litigation has some less worthy claims. However, there is good reason to suppose that the majority of citizen suits brought to date under the environmental laws have supplemented EPA's enforcement power and have focused on significant violations.

Other important findings by the Environmental Law Institute include the following:

*** Only 48% of the citizen cases resulted in the filing of lawsuits. Nearly half of the cases were dropped because negotiations were initiated.[41]

*** In 6% of citizen suits, the government intervened during the 60 day notice period and eventually filed suit.[42]

*** In 21% of citizen suits actions were dropped because of a lack of resources, agency modifications of the regulations, weak evidence, compliance or settlement.[43]

*** Of the citizen actions that resulted in the filing of lawsuits, 24% were settled before a judicial decision was made.[44]

Small numbers of citizen actions actually result in lawsuits, and nearly a quarter of these are settled prior to decision. These findings indicate that the burden of citizen suits on the federal courts is even less than the small numbers of notices filed might suggest.

Public Citizen believes that citizen suits are a valuable enhancement of scarce government enforcement resources. We support the citizen suits provision in S.51, but believe that section 138 would be improved by allowing for affected citizens to address "imminent and substantial endangerments."

VI. HAZARDOUS SUBSTANCE CLEANUP IS A PARTIAL RESPONSE--AID TO THOSE INJURED BY TOXIC EXPOSURE IS NEEDED.

Although S. 51 as reported by the Finance Committee does not address the need for aid to persons injured by hazardous waste exposure, Public Citizen and the public interest community consider a right for victims to sue under fair standards and procedures to be of paramount importance in the reauthorization of Superfund.

Currently the Superfund provides no remedy for health care costs from injuries, diseases or deaths associated with exposure to hazardous substances. Congress evaded the controversial issue of victims' compensation in 1980, and mandated a study of the adequacy of existing remedies and recommendations for needed revisions of law.[45]

In 1980, the Surgeon General together with the Congressional Research Service (CRS), reported to the Senate Committee on

Environment and Public Works, "The scope of the health problem that could derive from chemical waste dumps cannot be precisely estimated at present. The problem could be enormous."[46] The report reviews selected incidents of human exposure to toxic substances such as polybrominated biphenyls (PBB's), mercury, hexachlorophene, polychlorinated biphenyls (PCB's), carbon tetrachloride, trichloroethylene, benzene, and pesticide waste. Even this preliminary review indicated that significant health effects have been reported in these incidents, ranging from headaches, respiratory problems and nausea to paralysis, cancer and death.[47]

More recently, statistically significant increases in leukemia and certain birth defects have been found among residents of Woburn, Massachusetts who drank contaminated well water.[48] While we cannot claim to know the precise number of injuries from hazardous substances, we do know that they are occurring.

The study commissioned by the Congress in 1980, referred to as the 301(e) report, was published in September 1982. It concluded, "Available remedies are inadequate in view of the substantial number of claims that may arise, and the factual and legal complexities that will be involved in their litigation."[49] The study proposed a two-tiered system, consisting of an administrative system (geared toward providing swift but limited compensation for claims small enough to make court remedies inappropriate) and state court actions, modified to ease barriers victims currently face.

We know that existing mechanisms for compensation, such as workers compensation and the tort system, are not adequate in aiding toxic substance victims. The 1980 CRS report concluded, "In light of the information contained in this report, it would be difficult to dispute the widely held view that existing state law is not an efficient, effective or even predictable mechanism for recovering compensation for toxic substance pollution."[50] The 301(e) study and subsequent law review articles have reiterated this point.[51]

We regard a federal cause of action provision for toxic victims as long overdue. Money and authority to clean waste sites, while desparately needed, is not enough. The Superfund reauthorization should include measures to help reduce the number of victims of toxic exposure, including methods for citizens to require a site to be listed on the NPL if it ranks high enough when evaluated according to the hazard ranking system, and provisions to allow citizens to compel the EPA or responsible parties to take emergency action when dangerous human exposures occur. Cleaning sites properly and swiftly will in itself mitigate the problem of disease, injury and death associated with toxic exposure. But, there are people for whom prospective measures aimed at prevention are too late. Some of these victims are already injured or ill; some have died. Many others are exposed or will be exposed to waste site poisons as the glacial process of site evaluation, proposals, and cleanup goes on.

In addition to reauthorizing a larger, swifter and more accountable Superfund program, victims need the Congress to improve their opportunities to obtain relief by suing those who are responsible for toxic exposure.

The most comprehensive and swiftest method of reforming the judicial system to make it more fair for the toxic tort plaintiff is by establishing a federal cause of action which would be non-preemptive of other state or federal remedies but which would allow a person in any state to avail themselves of certain procedures which take into account the extraordinary burdens on a plaintiff in these suits.

A. FEDERAL CAUSE OF ACTION: Victims' Right to Sue Those Responsible for Injuries Resulting from Hazardous Substances Exposures.

One of the greatest inequities facing toxic substance injury victims is the great variability of state law and procedure determining their chances of success in the courts. Victims who happen to reside or be injured in Texas or New Jersey stand far greater chances of recovering against those responsible for their toxic exposure than someone with a substantively identical suit from South Dakota or Ohio. A right to sue under the federal Superfund law, in cases which could be filed in either in state or federal court, would remove this inequity.

A federal cause of action should not preempt or otherwise disrupt state remedies. We think a federal right to sue greatly enhances access to the courts for those injured from hazardous substances released from facilities or during transportation if it incorporates certain procedural improvements tailored to the special difficulties of toxic tort suits.

1. Statutes of limitations.

There are many respects in which toxic tort suits differ from the traditional traumatic injury tort suits, and the differences are ones which disfavor the toxic tort victim. The long latency period of cancers and other toxic-induced diseases increases the difficulty of amassing evidence on the nature and extent of the exposure, the identity and behavior of responsible parties and the causal nexus between exposure and injury. Medical science does not yet provide us with a clear understanding of the role between exposure to certain substances and health effects. Laws obviously cannot change a disease latency period or the state of scientific certainty, but they can recognize these peculiarities of toxic torts in fashioning an appropriate remedy. To do this, the Superfund reauthorization bill must establish a fair, nationally uniform statute of limitations.

A statute of limitations for the pursuit of a remedy is intended to prevent dilatory behavior or unfair surprise by the plaintiff. But in some states, toxic tort plaintiffs are being barred from the courthouse altogether, because their right to sue expires before they are aware of the toxic-induced disease or its cause. Some attorneys have attempted to avoid this problem by suing soon after exposure for acute effects and medical monitoring, but at this early stage damages are hard to assess. If the victims wait until toxic-induced cancer is in fact diagnosed, their right to sue in some states will have expired. The 301(e) study has illuminated the pernicious problem posed by statutes of limitations which bar recovery for victims of long latency diseases[52] and recommended reform. While only five states and the Virgin Islands[53] have the worst kind of statute of limitations for persons with long latency health effects—

beginning at the time of exposure--only thirteen jurisdictions[54] have the most appropriate limitations period, beginning when a plaintiff knew or should have known both that he or she has been injured and has a cause of action. In about half of the states, a plaintiffs' right to sue may have elapsed before he or she could or should have known that a remedy was available. Such a discovery rule should be incorporated in the federal cause of action.

2. Relevant Evidence.

The federal suit provision should help alleviate confusion and variability as to the admissibility of evidence which will be needed to make the plaintiff's case. Anachronistic state court hearsay, reliability and relevancy rulings are keeping essential evidence from being presented to the jury. Courts in some states rule against admitting scientific evidence derived from studying groups other than the parties before the court. Such often-excluded evidence includes epidemiological studies, animal studies, toxicological studies, tissue cultures, and immunological studies.

Although when the action is pursued in the federal courts, the Federal Rules of Evidence may allow much of this information under its definition of "relevant evidence" (Rule 401)[55] and exceptions to the hearsay rule (Rule 803, especially exceptions (4),(8),(18) and (24)),[56] it is unnecessarily disadvantageous to plaintiffs not to make explicit in the reauthorization bill the admissibility of such evidence.

We believe that the courts should be instructed to admit all evidence tending to make more or less probable the causal association between the exposure to the hazardous substance in question and the injury or damages. This is in keeping with the definition of "relevant evidence" in Rule 401 of the Federal Rules of Evidence, and is necessary to avoid unpredictable and unfair evidentiary rulings.

3. Compensable Damages.

It should be made clear that compensable damages under a federal cause of action are not solely limited to physical effects. Clarification is needed to ensure that the federal cause of action will not be read as precluding recovery for any physical, sensory, neurological, emotional or intellectual impairment traceable to hazardous substance exposure. Loss of intelligence from lead poisoning is not an insignificant injury, and where liability of a responsible party can be established, such an injury should be compensable in a tort suit.

The availability of punitive damages should also be explicitly provided in the federal cause of action. Where the injury occurs because of willful, intentional or reckless wrongdoing on the part of responsible parties, we believe that the threat of punitive damages can substantially deter future egregious corporate misconduct. Without the possibility of liability for the full costs of exposure, plus punitives, businesses involved in the production, transportation or disposal of hazardous substances cannot be expected to use utmost vigilance in protecting all citizens from the peril of exposure to hazardous substances.

4. Class Action Certification.

Much comment has centered on the cost of litigating toxic tort actions.[57] Novel kinds of actions or untested theories of liability are almost invariably more costly, and we can expect the costs of toxic tort lawsuits to decline over time. Unfortunately, it is still true as the 301(e) group reported in 1982, "[A] denial of plaintiff combinations in the bringing of such suits in effect denies a plaintiff the opportunity to bring the action at all, unless his claim is exceptionally large.[58]

To keep costs of suits at levels which will not preclude virtually all deserving plaintiffs from pursuing their tort remedies, class action certification should be granted where there are numerous plaintiffs with substantially similar issues of fact or law. Even where damages vary widely, class certification for purposes of liability issues would substantially reduce costs without sacrificing fairness.

The prerequisites of class action certification established by Rule 23(a) of the Federal Rules of Civil Procedure can be met in many cases involving mass exposure to hazardous substances.

However, the Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) (39 F.R.D. 69, 103) states:

> A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried...."

Although the comment plainly does not bar mass tort class actions, many courts have relied on it to deny plaintiffs' motions for class certification in mass tort or personal injury actions, especially those alleging negligence by one or more defendants over some period of time.[59]

The permissibility of using class actions in tort cases where the prerequisites of Rule 23(a) are met needs to be clarified. The Superfund reauthorization presents an ideal opportunity to facilitate the use of class actions in toxic tort suits where there are numerous plaintiffs with substantial similarities in the factual circumstances or their liability theories in toxic tort cases.

5. The Plaintiff's Proof of Causation

The causation issue is acknowledged to be extremely burdensome for a toxic tort plaintiff, both because of the paucity of medical and scientific information about certain toxics and because many diseases associated with toxics exposures occur, although with a lower rate of incidence, among unexposed populations.

We believe that explicit instructions about the plaintiff's burden of proof on the issue of causation in both the administrative and judicial systems is necessary to ensure that plaintiffs will not have their case prematurely dismissed simply because evidence establishing that exposure was a "but-for" cause of the injury may not yet be available for certain toxic substances at any price.

The 301 (e) study group advocated such a mechanism to ease the plaintiff's burden of proof in the administrative compensation system.[60] The plaintiff should be regarded as having made the showing needed to survive a motion to dismiss or a directed verdict on the issue of causation if he or she can show the following:

1) that the plaintiff was exposed to hazardous substances from a waste site or facility in some manner; and

2) that the plaintiff suffered death or the kind of injury, illness or disability of a type which can be caused or contributed to by an exposure to such hazardous substances.

Upon such a showing, the plaintiff would be regarded as having made a sufficient showing that the plaintiff's death or injury was caused by exposure to the hazardous substance to get before the jury or fact-finder. The plaintiff would not, of course, be guaranteed success before the jury or judge in the final analysis. The fact-finder would weigh the sufficiency of the evidence presented by the plaintiff as compared to rebuttal evidence provided by the defendant.

The 301 (e) study group called this instruction about the level of proof required on the causation issue a "rebuttal presumption." Many journalists and lobbyists misconstrue such a suggestion as guaranteeing recovery for every plaintiff who can make this showing. This is clearly not desirable, and is not what we have contemplated. The term "presumption" misleads people, perhaps. Upon making the required showing, the plaintiff is presumed only to be entitled to a complete hearing on the issue of causation. The verdict will be based on the totality of the testimony including evidence about the degree and duration of the waste-site exposure and the plaintiff's other exposures to carcinogens, presented by both the defendants and the plaintiff.

B. Non-exclusivity of Judicial and Administrative Remedies.

Public Citizen would support proposals for administrative compensation of toxic victims only where they are in addition to and non-exclusive of court remedies. We adamantly oppose proposals which would require an election between the administrative and judicial remedies--either or both should be available to the claimant who can meet the standards of proof. However, we agree double recovery should not be permitted.

The remedies will not be equally useful or available to all victims. The administrative proposals would not serve to make the claimant "whole," as the court remedy is intended to do. Rather, it merely helps to sustain the claimant at a decent, though minimal level. The compensation proposals presented to date would not reimburse many real costs, such as property devaluation or pain and suffering. Some would not provide compensation even for lost income. Nevertheless, some claimants may not have the resources--evidence, money or time--to enter the judicial process. The cost of toxicological and hydrogeological studies, and other expert testimony needed to succeed in the courts, sometimes exceeds one hundred thousand dollars. Identifying a solvent responsible party may often be impossible. Probably it will be the exceptional victim or exposed community who can find relief in the courts, but that remedy is nonetheless essential to ensure that the victim who has suffered enormous losses and who can surmount the evidentiary hurdles will be truly compensated. Only the judicial remedy would permit recovery of the full range of damages resulting from hazardous substance exposure.

VII. CONCLUSIONS

Public Citizen and the environmental, labor and citizen group coalition generally endorse the actions taken by the Committee on Environment and Public Works concerning the issues of greatest interest to the Judiciary Committee. We suggest a modification of the pre-enforcement review provision to ensure that when review is heard, objections not raised during the public comment period in appropriate cases, may be raised. We suggest an expansion of the citizen suit provision, modeled after the Resource Conservation and Recovery Act amendments endorsed by the Senate on October 5, 1984 and subsequently signed into law. We endorse an amendment to establish a right for persons injured by hazardous substance exposure to sue those causing their exposure under the Superfund. We also support administrative compensation measures so long as they do not restrict a claimants' right to redress in the courts.

In other regards, we urge the Committee to adopt the language of S.51 as reported by the Committee on Environment and Public Works.

APPENDIX A

STATUTES OF LIMITATIONS
FOR TOXIC TORTS

** SIX JURISDICTIONS FOLLOW THE TRADITIONAL RULE, REJECTING THE DISCOVERY RULE.

In these jurisdictions the statutory period begins to run when the "actionable conduct" (i.e. the toxic exposure) occurs. The period for filing suits varies in these states between 1 year and 3 years. This statute of limitations leaves victims of diseases which take years to develop, such as cancers and heart disease, without a chance to sue those who injured them.

ALABAMA
NEW YORK
SOUTH DAKOTA
VIRGIN ISLANDS
IDAHO (by statute)
VIRGINIA (by statute)

** "DISCOVERY RULES" EXIST IN OTHER JURISDICTIONS, BUT VARY SIGNIFICANTLY IN HOW WELL THEY PROTECT TOXIC TORT VICTIMS' RIGHT TO A FAIR DAY IN COURT.

Out of 53 jurisdictions (including the District of Columbia, the Virgin Islands, and Puerto Rico) only 26 jurisdictions, about half, have statutes of limitations which do not run until the plaintiff knows or should know of the cause of injury or that he or she has a cause of action (implying that plaintiff knows or should know of the link between the defendant's action or omission and the injury). Only in these jurisdictions will a person injured by exposure to hazardous substances be protected from the expiration of a statute of limitations before scientific or medical information develops which would provide the basis of a lawsuit against those responsible for releasing hazardous substances.

* In five states the statute of limitations begins to run when the plaintiff's injuries are capable of ascertainment. (It is unclear whether this means when symptoms first appear or when there is an unequivocal diagnosis of particular disease or injury.) In these states you must file shortly after you learn of your disease, even if you do not yet have evidence that you were exposed to toxics which could have caused your disease.

ARKANSAS
INDIANA
KANSAS
MAINE
NORTH CAROLINA

* In two jurisdictions, the the statute of limitations begins to run when plaintiff actually discovers or knows he or she has a particular disease or injury. Under these laws, you lose your right to sue 3 or 4 years after learning of your disease, even if you do not yet know what could have caused the disease.

DISTRICT OF COLUMBIA
NEBRASKA

* In six states, the cause of action accrues when plaintiff knows, or should know (in the exercise of reasonable judgment) that he or she has suffered a disease or injury. In these states, the law provides only 1 to 3 years to bring suit. Often plaintiffs may learn of their disease but not learn until too late that a toxic exposure may have caused or aggravated the disease.

CONNECTICUT
DELEWARE

GEORGIA
TENNESSEE
OHIO (See O'Stricker v. Jim Walker Corp., 4 Ohio St. 3rd 84 (1983).) (Limited to asbestos and chromium).
WISCONSIN (See Hansen v. A.H. Robins, 113 Wis. 2d 550, 335 N.W. 2d 578 (1983).)

(CT imposes a limit of three years after the act or omission which caused the injury which makes it similar to the states which reject the "discovery rule".)

* Thirteen jurisdictions start the statute of limitations running when the plaintiff discovers or should reasonably have discovered, not only the fact of injury or disease, but also its cause. These states are more protective of toxics victims than the preceding states. Even so, in these states a victim may be left without remedy if it is known , for example, that benzene caused the leukemia, but it is unknown until much later which company was responsible for the release of benzene into the environment.

CALIFORNIA
ILLINOIS
IOWA
KENTUCKY
MARYLAND
MASSACHUSETTS
MINNESOTA
MISSOURI
NEW HAMPSHIRE
OKLAHOMA
OREGON
VERMONT
WASHINGTON

* Thirteen jurisdictions begin the running of the statute at the time the plaintiff realizes, or should realize, that he or she has suffered an injury or disease and has a cause of action. This form of statute of limitations is the most protective of toxic victims. The right to sue does not expire until several years elapse after the victim learns: 1) of the disease, 2) of the connection between the toxic exposure and the disease, and 3) of the defendant's responsibility for the release of the hazardous substance.

ARIZONA
COLORADO
FLORIDA
HAWAII
LOUISIANA
MICHIGAN
MONTANA
NEW JERSEY
PUERTO RICO
SOUTH CAROLINA
TEXAS
WEST VIRGINIA
WYOMING

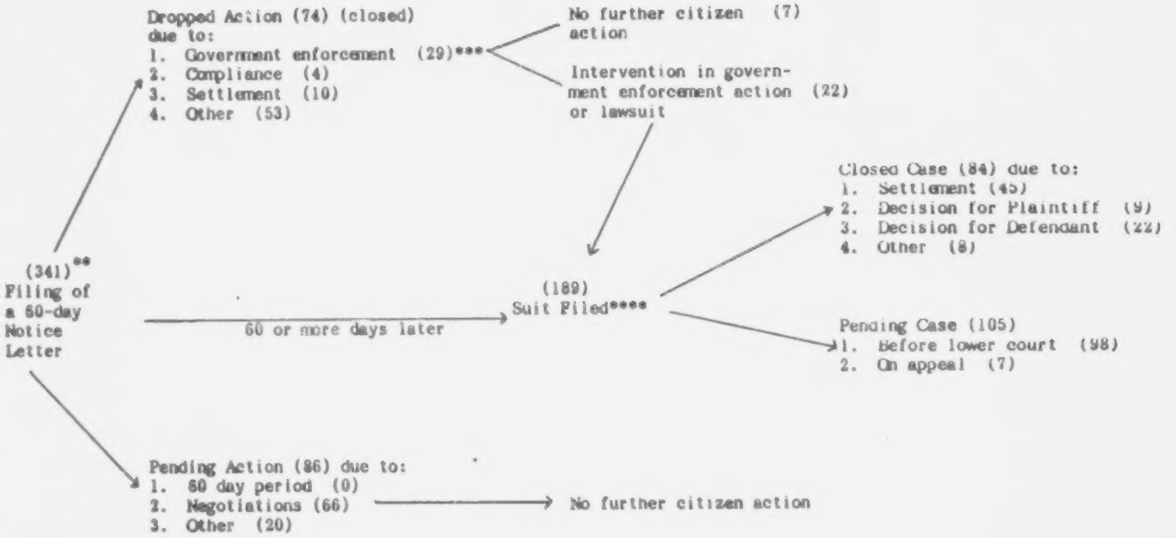
** EIGHT JURISDICTIONS HAVE NOT YET DECIDED THE QUESTION OF THE STATUTE OF LIMITATIONS WHICH WILL BE APPLIED TO LONG-LATENCY DISEASES.

ALASKA
MISSISSIPPI
NEVADA
NEW MEXICO
NORTH DAKODA
PENNSYLVANIA
RHODE ISLAND
UTAH

Source: Injuries and Damages from Hazardous Wastes--A Report to Congress in Compliance With Section 301(e) of CERCLA "Superfund", September 1982, Part 2, pages 13-78.
Superfund 301(e) Study--Update, Congressional Research Service, April 15, 1985.

APPENDIX B: CITIZEN SUIT ANALYSIS

Figure A. Citizen Actions *


(341)**
Filing of a 60-day Notice Letter
Dropped Action (74) (closed) due to:
1. Government enforcement (29)***
2. Compliance (4)
3. Settlement (10)
4. Other (53)
No further citizen action (7)
Intervention in government enforcement action or lawsuit (22)
60 or more days later
(189)
Suit Filed****
Closed Case (84) due to:
1. Settlement (45)
2. Decision for Plaintiff (9)
3. Decision for Defendant (22)
4. Other (8)
Pending Case (105)
1. Before lower court (98)
2. On appeal (7)
Pending Action (86) due to:
1. 60 day period (0)
2. Negotiations (66)
3. Other (20)
No further citizen action

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* Numbers in parentheses represent the number of known cases in ELI's sample found in each of the different categories.

** 8 suits had no citizen notice letter.

*** 22 of these instances of government enforcement resulted in a government lawsuit and are counted as part of the 189 lawsuits, not as notices where action was dropped.

****The status or outcome of suits filed is as of April 30, 1984.

SOURCE: ENVIRONMENTAL LAW INSTITUTE, An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, September 1984

APPENDIX B: CITIZEN SUIT ANALYSIS

Figure D. Known Notices and Suits
(By Year and Statute)

STATUTE*

	CWA	CAA	RCRA	TSCA	SDWA	RCRA/CWA**	CAA/CWA**	OTHER***	TOTAL
1978	1 (0,1)****	4 (0,4)						2 (0,2)	7 (0,7)
1979	9 (1,8)	15 (4,11)	2 (0,2)			1 (0,1)	1 (0,1)		28 (5,23)
1980	6 (2,4)	20 (13,7)	5 (3,2)			2 (0,2)		2(0,2)	35 (18,17)
1981	6 (0,6)	9 (4,5)	4 (1,3)			2 (0,2)	2 (1,1)		23 (6,17)
1982	19 (3,16)	5 (1,4)	4 (2,2)		1 (0,1)	2 (0,2)		1 (0,1)	32 (6,26)
1983	108 (46,62)	3 (3,0)	10 (7,3)	2 (1,1)		6 (3,3)		2 (1,1)	131 (61,70)
1984 (Jan 1-April 30)	87 (61,26)	1 (1,0)	2 (0,2)	2 (2,0)		1 (0,1)			93 (64,29)
TOTAL	238 (113,123)	57 (26,31)	27 (13,14)	4 (3,1)	1 (0,1)	14 (3,11)	3 (1,2)	7 (1,6)	349 (160,189)

* There were no reported actions under NCA.

** Both statutes were cited in the action.

*** Other actions cited multiple statutes in the following combinations: CWA/SDWA, CWA/RCRA/TSCA, CAA/NCA, CAA/CWA/SDWA, CWA/TSCA, RCRA/SDWA, RCRA/TSCA.

**** Total actions (notices only, suits).

SOURCE: Environmental Law Institute, Citizen Suits: An Analysis, September 1984.

APPENDIX B: CITIZEN SUIT ANALYSIS

Figure G. Results of Known Lawsuits* From January 1, 1978 to April 30,1984
(By Statute and Type of Plaintiff and Defendant)**

DEFENDANT		NATIONAL/REGIONAL GROUP								NON-NATIONAL/REGIONAL GROUP									
		CWA	CAA	RCRA	TSCA	SDWA	RCRA/[1] CWA	CAA/[1] CWA	OTHER[2]	CWA	CAA	RCRA	TSCA	SDWA	RCRA/ CWA	CAA/ CWA	OTHER	TOTAL
LARGE***	P WON	1									3							4
	D WON		4							4	5				1		1	15
	SET-TLED	10	2							9	8	2			1	2		34
	OTHER	1								2	1							4
	PENDING	54	2							7	4	4			4			75
SMALL	P WON			1						3					1			5
	D WON									2		2			1		2	7
	SET-TLED									6	1		1	1	1		1	11
	OTHER									1	1	1			1			4
	PENDING	19								4		4			1		2	30
	TOTAL	85	8	1						38	23	13	1	1	11	2	6	189

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* Including 22 interventions in a state or federal lawsuit.

** There were no reported actions under NCA.

*** Large = either 1) a company with greater than $100 million in sales; 2) a subsidiary of a company with greater than $100 million in sales; 3) a state or federal agency; or 4) a city with a population of greater than 500,000.

[1] Both statutes were cited in the lawsuit.

[2] Other actions that cited multiple statutes in the following combinations: CWA/SDWA, CWA/RCRA/TSCA, CAA/NCA, CAA/CWA/SDWA, CWA/TSCA, RCRA/SDWA, RCRA/TSCA.

SOURCE: ENVIRONMENTAL LAW INSTITUTE, Citizen Suits: An Analysis, September 1984.

NOTES

1. See, W. Page Keeton, general editor, Prosser and Keeton on Torts, St. Paul, Minnesota: West Publishing Co., Fifth Edition, 1984, page 547.

2. See, e.g., Steuart Transportation Co. v. States, 596 F.2d 609, 613 (4th Cir. 1979); United States v. Inc., 589 F.2d 1310, 1314-15 (7th Cir. 1978); Burgess v. Tameano, 564 F.2d 964, 982 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978); Tug Ocean Prince, Inc. v. United States, 436 F.Supp. 907 (S.D. N.Y. 1977), aff'd in part, rev'd in part on other grounds, 584 F.2d 1151 (2d Cir. 1978).

3. United States v. Chem-Dyne, et al., 572 F.Supp. 802, at 805 (S.D. Ohio, 10/11/83 as amended); United States v. Northeastern Pharmaceutical and Chemical Co., Inc., et al., 579 F.Supp 823, at 843-844. (W.D. Mo., 1984).

3a. Landers v. East Texas Salt Water Disposal Co. (pollution), 151 Tex. 251, S.W.2d 731 (1952); Burns v. Lamb, (pollution) Tex. Civ. App., 312 S.W.2d 730 (1958); and Phillips Petroleum Co. v. Hardee, (pollution of irrigation waters) 189 F.2d 205 (5th Cir. 1951). Also see cases cited by Prosser and Keeton, supra, at p. 351.

4. United States v. Chem-Dyne, et al., supra, at 811. See also the extensive discussion of the facts in United States v. Northeastern Pharmaceutical, supra, at 827-833, which is illustrative of the difficulties of establishing divisibility.

5. United States v. Chem-Dyne, et al., supra, at 810-811; United States v. Wade, et al., 577 F.Supp 1326, 1337-1339 (E.D. Pa., 1983); United States v. Northeastern Pharmaceutical, supra, at 844-845; United States v. A&F Materials Co., 578 F.Supp. 1249 at (S.D. Ill., 1984).

6. See United States v. Northeastern Pharmaceutical, supra, at 845. The court cites the following cases interpreting section 311 of the Federal Water Pollution Control Act ("Clean Water Act"), 42 U.S.C. §1321, as imposing joint and several liability: United States v. M/V Big Sam, 681 F.2d 432, 438-39 (5th Cir. 1982), on petition for rehearing and suggestions for rehearing en banc, 693 F.2d 451 (5th Cir. 1982); United States v. Hollywood Marine, Inc., 519 F.Supp. 688, 692 (S.D. Tex. 1981); and United States v. Bear Marine Services, 509 F.Supp. 710, 718-19 (E.D. La. 1980).

7. See T. Lawrence Jones, American Insurance Association, "Superfund, Superbust," opinion piece, New York Times 5/24/35.

7a. T. Lawrence Jones, Id.

8. See "Chem-Dyne Waste Settlement Could be Model for the Future," Legal Times, May 20, 1985.

9. Philip Shabecoff, "Westinghouse to Clean Up 6 Toxic Waste Dumps in Indiana," New York Times, p. A-14, May 21, 1985; Cass Peterson, "Westinhouse Signs Pact on Toxic-Waste Cleanup," Washington Post, p. A-9, May 21, 1985.

10. Prosser and Keeton, supra, "Apportionment of Damages," p. 345.

11. See, e.g., United States, et al. v. J.B. Stringfellow, Jr., et al., 20 Env't Rep. Cas. 1905, 14 E.L.R. 20385, at 20387, (C.D. Cal., April 5, 1984); United States v. Wade, et al., 577 F.Supp. 1326, 1338-1339, (E.D. Pa., December 20, 1983); United States v. Chem-Dyne Corp., 572 F.Supp. 802, 810-811, (S.D. Oh., Oct. 11, 1983 as amended Oct. 14, 1983).

12. Id.

13. Public Law 96-510, December 11, 1980, section 105, codified at 42 U.S.C. §9605.

14. Public Law 96-510, section 107(a)(4)(A) and (a)(4)(B), codified at 42 U.S.C. §9607 (4)(A) and (4)(B). See also, the National Contingency Plan, at 40 C.F.R. Part 300, revised as of July 1, 1984.

15. Public Law 96-510, section 104(a)(1), codified at 42 U.S.C. §9604(a)(1).

16. 577 F.Supp. 1326, 1337-1339, (E.D. Pa., December 20, 1983).

17. United States v. Wade, supra, 577 F.Supp. at 1332-1333 (1983).

18. United States v. Ward, 8 Chem. & Rad. Waste Litigation Reporter 484, 487-88 (D. N.C., May 14, 1984).

19. Superfund Improvement Act of 1985, Report of the Committee on Environment and Public Works, United States Senate, to accompany S. 51, Senate Report 99-11, March 18, 1985, p. 44-45.

20. Prosser and Keeton, supra, p. 339.

21. Public Law 96-510, Section 113(a), codified at 42 U.S.C. §9613(a).

22. Senate Report No. 99-11, March 18, 1985, supra, p. 57.

23. 42 U.S.C. §9613.

24. In Abbott Laboratories v. Gardner, 387 U.S. 136 at 140-141 (1967), the U.S. Supreme Court ruled that clear Congressional intent can restrict access to courts for pre-enforcement review. In the Abbott case, the statute underlying the regulation at issue, the Food, Drug, and Cosmetic Act amendments of 1962, did not evince a Congressional intent to restrict suits before the agency seeks enforcement of the statute or regulation, and the Court permitted pre-enforcement review.

25. See Lone Pine Steering Committee v. EPA, 22 Env't Rep. Cas. (BNA) 1113 (D. N.J., 1/21/85). But see Aminoil, Inc. v. EPA, (D.C. Cal., No. CV. 84-5853 Kn(Px), 9/28/84), cited at 53 L.W. 2214, 10/30/84, where the court enjoined the operation of the CERCLA provision imposing a penalty for violation of a cleanup order, but did not enjoin cleanup.

26. See, eg., California Code of Civil Procedure, Chapter 3, Section 525-527.

27. In the Aminoil decision, supra, the federal district court in finding the penalty provision violative of due process guarantees specifically noted the absence of procedures to allow potentially responsible parties to comply with an order and then challenge its validity and seek reimbursement of penalties or costs from the government.

28. Public Law 79-404, June 11, 1946, codified at 5 U.S.C. 551 et seq.

29. Senate Report 99-11, supra, p. 57.

30. Clean Air Act §304, 42 U.S.C. §7604;
Federal Water Pollution Control Act, §505, 33 U.S.C. §1365;
Toxic Substances Control Act, §20, 15 U.S.C. §2619;
Resource Conservation Control and RecoveryAct, §7002, 42 U.S.C. §6972;
Noise Control Act, §12, 42 U.S.C. §4911;
Safe Drinking Water Act, §1449, 42 U.S.C. §300j-8;
Marine Protection Research and Sanctuaries Act, §105(g), 33 U.S.C. §1415(g);

Endangered Species Act, §11(g), 16 U.S.C. §1540(g);
Deepwater Port Act, §16, 33 U.S.C. §1349(a);
Surface Mining Control and Reclamation Act, §520, 30 U.S.C. §1270.

31. Resource Conservation and Recovery Act amendments of 1984, Public Law 98-616, section 7003(a).

32. See Senate Report 98-631, Superfund Amendments of 1984, Report of the Committee on Environment and Public Works Committee, United States Senate, pages 157 and 158. The Committee lists at p. 157 thirty-four (34) pesticides identified for a rebuttable presumption against registration with waste streams reportedly not regulated by RCRA. On page 158, the Committee lists eighty-seven (87) chemicals having substantial evidence of carcinogenicity with waste streams reportedly not regulated by RCRA.

33. EPA Contract no. 68-01-6558, Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, September 1984.

34. Environmental Law Institute, supra, page III-10.

35. Id., page V-25.

36. Environmental Law Institute, op. cit., pages V-25 and 26.

37. S. 51 as reported by the Committee on Environment and Public Works, March 7, 1985, section 138 at new section 118 (b).

38. Id., section 138 at new section 118(c).

39. Id., section 138 at new section 118(d).

40. Environmental Law Institute, supra, pages V-9 and V-10.

41. Id., page III-8, Figure B. "Reasons for Not Filing Suit Following Notice".

42. Id., page III-4.

43. Id., page III-4 and III-6.

44. Id., page III-4.

45. Injuries and Damages from Hazardous Wastes--Analysis and Improvement of Legal Remedies. Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation & Liability Act of 1980 (P.L. 96-510), Senate Committee on Environment and Public Works, Sept. 1982.

46. Health Effects of Toxic Pollution: A Report from the Surgeon General, Reports prepared by th Surgeon General, Department of Health and Human Services and the Congressional Research Service, for the Committee on Environment and Public Works, U.S. Senate, August 1980, p. 22.

47. Ibid., pages 153-312.

48. Lagakos, Wessen and Zelen, Harvard School of Public Health, The Woburn Health Study, 1984. See also "Leukemia Strikes A Small Town," by Paula Di Perna, The New York Times Magazine, December 2, 1984.

49. Injuries and Damages from Hazardous Wastes--analysis and Improvement of Legal Remedies. Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation & Liability Act of 1980 (P.L. 96-510), Senate Committee on Environment and Public Works, Sept. 1982, Part I, p. 193.

50. Six Case Studies of Compensation for Toxic Substances Pollution. A report prepared under the supervision of the Congressional Research Service by Environmental Law Institute, for the Committee on Environment and Public Works, U.S. Senate, June 1980, pages 520-1.

51. Jeffrey Trauberman, "Statutory Reform of 'Toxic Torts'," exerpted at 7 Harvard Environmental Law Review 177 (1983); James R. Zazzali and Frank Grad, "Hazardous Wastes: New Rights and Remedies," 13 Seton Hall Law Review 446 (1983); Comment, "Establishing Liability for the Damages from Hazardous Wastes: An Alternative Route for Love Canal Plaintiffs," 31 Catholic University Law Review 273 (1982).

52. Injuries and Damages from Hazardous Wastes (September 1982), op. cit., Part 1, pp. 28-30, and Part 2 (Appendices), pp. 13-79.

53. As of early 1985 six jurisdictions--two by statute and four by judicial determination--have such rules. They are Idaho and Virginia (by statute), and Alabama, New York, South Dakota, and the Virgin Islands. In addition, Ohio has an exposure-triggered filing period, except in cases of chromium or asbestos-induced disease. Superfund 301(e) Study -- Update, Congressional Research Service, April 15, 1985.

54. This form of the "discovery rule" is in effect in Arizona, Colorado, Florida, Hawaii, Puerto Rico, Louisiana, Michigan, Montana, New Jersey, South Carolina, Texas, West Virginia, and Wyoming.

55. Federal Rules of Evidence, Rule 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

56. Exception 803(4) covers statements for purposes of medical diagnosis or treatment; (8) concerns public records and reports; (18) involves information published in reliable treatises, periodicals or pamphlets; and (24) involves other circumstantial guarantees of trustworthiness.

57. See Kakalik, et. al., Costs of Asbestos Litigation, the Rand Corporation Institute for Civil Justice, 1983; Trauberman, Statutory Reform of "Toxic Torts," Environmental Law Institute, 1983, p. 29-30; and 301(e) study, op. cit., Part 1, pp. 67-8.

58. Injuries and Damages from Hazardous Wastes, op. cit., Part 1, page 257.

59. See In re Dalkon Shield Cases 693 F.2d 847, 852 (9th cir., 1982); Yandle v. PGG Industries, Inc., 65 F.R.D. 566, 569 (E.D.Tex. 1974) (Asbestosis); Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979) (DES action); Mink v. University of Chicago, 460 F.Supp. 713 (N.D. Ill. 1979) (DES); Harrigan v. United States, 63 F.R.D. 402 (E.D.Penn. 1974) (negligent surgery); Snyder v. Hooker Chemicals and Plastics Corp., 104 Misc. 2d 735, 429 N.Y.S.2d 153 (1980) (Love Canal toxic waste action); Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11, 407 N.Y.S.2d 196 (1978) (Dalkon Shield); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D.Penn. 1970) (airplane crash); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500, 501 (E.D.N.Y. 1975) (airplane crash); In re Federal Skywalk cases, 680 F.2d 1175 (8th Cir. 1982); In re Dalkon Shield Products Liability Litigation, 693 F.2d 847 (9th Cir. 1982), cert. denied 51 U.S.L.W. 3552 (1/27/83).

60. Injuries and Damages from Hazardous Wastes (September 1982), op. cit., Part 1, pages 196-210; Part 2, pages 312-340. The 301 (e) study group stated that the presumption in tort actions should be "left to the development of the law in the several states." Ibid, Part 1, page 260.

The **Chairman**. Ms. Hathaway, is it not true that the citizen suits in the other environmental laws were established for and intended to specifically apply to the licensing or regulatory scheme of that particular law, and is not the citizen suit provision in effect an entirely different mechanism?

Ms. **Hathaway**. The citizen suit provisions that exist in the other eleven environmental statutes are designed to aid in the implementation both of the permitting schemes that are actually under those statutes, and also to make sure that violations of the statute are enforced against.

There are provisions both for making sure that permits are not violated, and also that the mandatory statutory provisions are obeyed.

The **Chairman**. Now, Senator Simpson has some questions. Would you answer those for the record?

Ms. **Hathaway**. Certainly.

[The following was received for the record:]

QUESTIONS SUBMITTED TO JANET HATHAWAY [illegible] SENATOR ALAN SIMPSON

(1) THE *CITIZEN SUIT* PROVISION IN S. [illegible] IS LIMITED TO *NON-DISCRETIONARY DUTIES* OF THE ADMINISTRATOR. HOW WILL THIS, AS A PRACTICAL MATTER, WORK WITH THE RCRA CITIZEN SUIT PROVISION BASED ON "*IMMINENT AND SUBSTANTIAL ENDANGERMENT*"?

(2) WHY IS A CITIZEN SUIT PROVISION NEEDED IN CERCLA? AFTER ALL, THE STATUTE, BEING A PUBLIC WORKS STATUTE, DOES NOT HAVE THE SAME TYPE OF EASILY-ASCERTAINABLE AND REVIEWABLE STANDARDS AS SOME WOULD SUGGEST THE CLEAN WATER ACT HAS.

(3) DON'T CITIZEN SUITS THREATEN TO SLOW CLEAN UP IF THEY BECOME USED IN THE WAY YOU SUGGEST?

June 10, 1985

Janet S. Hathaway, Staff Attorney, Congress Watch
Answers to questions submitted by Senator Simpson

(1) The "non-discretionary duties" provision in the S.51 citizen suit section refers exclusively to acts or duties which are non-discretionary under CERCLA. This section should be available to ensure that those to whom the President has delegated power for the execution of the "Superfund" law do not violate the statutory mandates.

The applicability of the RCRA citizen suit provision for "imminent and substantial endangerments" is extensively discussed in response to a related question asked by Senator Thurmond. I enclose the answer I provided to Senator Thurmond's question about the RCRA "imminent and substantial endangerments" provision:

(1)(a) Section 7003, the "imminent hazard" provision of RCRA, applies only where the hazard is posed by "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste" which may present an imminent and substantial endangerment to health or the environment." The scope of this section is controlled by the RCRA definition of "solid waste or hazardous waste."

The listed hazardous wastes under RCRA do not include all "hazardous substances" as defined by CERCLA, section 101(14). Section 7003 of RCRA could not be used at Superfund sites unless the material posing the "imminent and substantial endangerment" is within the RCRA definition of hazardous or solid waste. However, there are numerous hazardous substances which are not RCRA wastes. For example, the Senate Environment and Public Works Committee lists thirty-four pesticides with rebuttable presumptions against registration, the wastes from which are not regulated by RCRA. (See Senate Report 98-631, Superfund Amendments of 1984, p. 157.) The Committee also lists eighty-seven chemicals having substantial evidence of carcinogenicity with waste streams not regulated by RCRA. (See Senate Report 98-631, Id., p. 158.). I am enclosing these lists, which include substances which are known to cause adverse human health consequences, such as EDB (Ethylene Dibromide), Paraquat, Ethylene Oxide, Strychnine Sulfate, Kepone and Tris (2-3-dibromopropyl) phosphate. I know of no information on the number of Superfund sites with substances unregulated by RCRA as a hazardous or solid waste.

(2) A citizen suit is needed under CERCLA to complement and enhance Justice's and EPA's enforcement programs.

As your question suggests, there are relatively few mandatory duties on the agencies with authority to implement CERCLA. However, there are duties which are currently unenforceable by citizens. For example, section 104(d)(2) of CERCLA states that "Any records, reports, or information obtained from any person . . . . shall be available to the public . . . ." Although the language of the section elaborates certain exceptions, both individual citizens and business representatives could be aggrieved if the information were not divulged by the Agency. There also are requirements in the statute concerning the National Contingency Plan to be issued by EPA, and a few statutory deadlines for the issuance of implementing regulations (such as the regulations specified at 106(c) on the imminent hazard authority, and at 108(b) requiring facilities to establish and maintain evidence of financial responsibility for production, transportation, treatment, storage, or disposal of hazardous substances.).

By statute, regulation and order effective under CERCLA, there are requirements imposed on some private parties. For example, at section 103(c), the statute requires private parties to notify EPA of facilities at which it disposed hazardous wastes. Section 103(a) of CERCLA requires that any person in charge of facilities notify the National Response Center in the event of certain releases of hazardous substances. Currently, these provisions are enforceable only if DOJ devotes its scarce resources to building a case to identify and halt a violation.

Because there are fewer non-discretionary duties and fewer easily ascertainable, reviewable standards under Superfund than under statutes such as the Clean Water Act (CWA), there will probably be relatively few citizen suits under CERCLA. The burden on the courts will almost certainly be very small. As I pointed out in my formal statement, the majority of citizen suits to date have been brought under the CWA. Environmental Law Institute found 236 total actions under the CWA between January 1, 1978 and March 30, 1984. Of these, 160 actions consisted of notices only, and 189 involved the filing of lawsuits. The seven other environmental statutes studied by ELI accounted for only 113 actions over the same six-and-one-half year period, with 47 notices and 66 lawsuits filed. The Toxic Substances Control Act, which is much like Superfund in the paucity of statutory requirements, involved only four citizen suits (3 notices and 1 lawsuit filed) in the same period.

(3) Notice must be presented to the federal government, to the state and to any alleged violator ninety days before a citizen suit is commenced. If there is reason to think that the action will disrupt a cleanup, the state or federal government may

commence a suit, thereby precluding the citizen suit from proceeding. Alternatively, representatives of the federal or state government may intervene as a matter of right to ensure that governmental interests (such as expeditious cleanup) are represented. Finally, affected citizens usually consider swift cleanup of paramount importance. Where it can be demonstrated that their suit will delay cleanup, citizens may be strongly inclined to negotiate or to drop their suit. As the ELI data indicates, only 48% of citizen cases resulted in the filing of lawsuits. And of the lawsuits filed, 24% were settled before a judicial decision was made. This history under the other environmental statutes with citizen suit provisions is reason to believe that a CERCLA citizen suit provision will not thwart the common goal of citizens and government: swift, complete cleanups.

The CHAIRMAN. We have a few questions here, if you would answer those for the record, too.

Ms. HATHAWAY. Certainly, Senator.

[The following was received for the record:]

QUESTIONS SUBMITTED TO JANET HATHAWAY FROM SENATOR STROM THURMOND

(1) In your testimony you imply that the citizen suits provision of S. 51 is similar to those in eleven other environmental statutes and, in fact, is "narrower" than the citizen suits provisions of section 7003 of RICRA - You also say "that the RCRA 'hazardous waste' definition includes on a minor subset of the over 700 hazardous substances designated under CERCLA".

- by these statements are you saying that most CERCLA sites are not now covered by section 7003 of RCRA?
- and could you explain how the "non discretionary duty" provision in Superfund is narrower than other provisions.

(2) In your testimony you acknowledge that there is the possibility of a citizen suit being brought for a "trivial violation". Does this mean that there is the potential for citizen suits to be filed for trivial violations as a means of harassment or extortion against a private party individual or the government?

(3) You set out some interesting percentages about the number of citizen suits that were begun versus the number that actually make it to trial: Over half of the actions were dropped before a lawsuit was filed. Of those actually becoming lawsuits almost half (21%+24%=45%) never go into court. Of those remaining suits how many have resulted in judgements for the plaintiff? - and what percentage of the overall number of citizen suits action these judgements represent?

June 10, 1985

Janet S. Hathaway, Staff Attorney, Congress Watch
Answers to questions from Senator Thurmond:

(1)(a) Section 7003, the "imminent hazard" provision of RCRA, applies only where the hazard is posed by "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste" which may present an imminent and substantial endangerment to health or the environment." The scope of this section is controlled by the RCRA definition of "solid waste or hazardous waste."

The listed hazardous wastes under RCRA do not include all "hazardous substances" as defined by CERCLA, section 101(14). Section 7003 of RCRA could not be used at Superfund sites unless the material posing the "imminent and substantial endangerment" is within the RCRA definition of hazardous or solid waste. However, there are numerous hazardous substances which are not RCRA wastes. For example, the Senate Environment and Public Works Committee lists thirty-four pesticides with rebuttable presumptions against registration, the wastes from which are not regulated by RCRA. (See Senate Report 98-631, Superfund Amendments of 1984, p. 157.) The Committee also lists eighty-seven chemicals having substantial evidence of carcinogenicity with waste streams not regulated by RCRA. (See Senate Report 98-631, Id., p. 158.). I am enclosing these lists, which include substances which are known to cause adverse human health consequences, such as EDB (Ethylene Dibromide), Paraquat, Ethylene Oxide, Strychnine Sulfate, Kepone and Tris (2-3-dibromopropyl) phosphate. I know of no information on the number of Superfund sites with substances unregulated by RCRA as a hazardous or solid waste.

(b) The "non-discretionary duty" provision in the citizen suit section is phrased in identical terms to the parallel provision in other environmental statutes. It may well have less frequent application under Superfund, because CERCLA requires relatively fewer statutorily mandated non-discretionary acts or duties of the President or his delegee than other environmental laws.

(2) There is no evidence that citizen suits have been filed as a means of harassment or extortion. There are remedies available, including countersuits for malicious abuse of legal process, if such cases were to arise. Despite the substantial financial deterrents which make it unlikely that a citizen suit will be pursued for any trivial violation of the statute, it is not inconceivable that a case could be filed (either by an individual

citizen or by an industry representative) which is less than meritorious. This inability to categorically bar suits which some may deem "trivial" is, of course, not unique to citizen suits, but is an unavoidable concommitant of our society's commitment to due process. One person's due process is often another's "trivial" lawsuit.

(3) According to data compiled by the Environmental Law Institute, of the 189 citizen suits filed, only 84 cases had closed. Of these 84, 45 were settled prior to judicial decision, 9 resulted in judgments for plaintiffs and 22 resulted in judgments for defendants. Defendants were approximately twice as likely to prevail at trial, which is unsurprising in that the plaintiff bears the burden of proving the case by a preponderance of the evidence. ELI did not analyze whether settlements tended to favor plaintiffs or defendants.

TO: Senator Strom Thurmond, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building

FROM: Janet Hathaway, Congress Watch, 546-4996

DATE: June 10, 1985

RE: Necessity of citizen suit provision for imminent and substantial endangerment by hazardous substance, pollutant or contaminant under Superfund.

The citizen suit language in S.51, the Superfund Improvement Act of 1985, is narrower than that provided in the recently-enacted amendments to the Resource Conservation and Recovery Act of 1976, Public Law 98-616. The 1984 RCRA amendments include a citizen suit section allowing persons to sue anyone whose "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment. No comparable authority is granted in S.51, despite the fact that the RCRA "hazardous waste" definition includes only a minor subset of the 698 "hazardous substances" designated under CERCLA.

Public Citizen supports a Superfund citizen suit provision permitting action against persons whose past or present generation, storage, treatment, transportation or disposal of hazardous substances poses an imminent and substantial endangerment.

Section 7002 of the Resource Conservation and Recovery Act (RCRA) permits citizen to sue any person alleged to be in violation of "any permit, standard, regulation, condition, requirement, prohibition, or order" effective under RCRA, or against the Administrator for failure to perform any non-discretionary act or duty. Obviously, this section would not provide a remedy for violations of Superfund or any other act, and this type of provision, if added to Superfund in this reauthorization, would not be duplicative.

Section 7003, the "imminent hazard" provision, permits citizen suits against any person "including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility" who has contributed or who is contributing to "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste" which may present an imminent and substantial endangerment to health or the environment.

The question which you raise is whether the RCRA definition of "solid waste or hazardous waste" is comprehensive enough to include "any hazardous substance" which could pose an imminent hazard at a Superfund site. (Such an "imminent hazard" provision was adopted by the House as part of H.R.5640, the Florio Superfund reauthorization bill of 1984. See the Congressional Record for August 10, 1984, pages H8929-H8935 for the floor debate and the vote on the citizen suit provision. The Sawyer motion to strike the provision was defeated 141-248.) If the RCRA imminent hazard citizen suit authority is equally broad as the H.R. 5640 language, the RCRA provision would obviate the need for a similar provision under CERCLA. However, my analysis of the provisions lead me to conclude that the H.R. 5640 language is significantly broader.

As you know, "solid waste" and "hazardous waste" are terms defined by RCRA at section 1004 (27) and (5), respectively. The "solid waste" definition reads:

> The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

The solid waste definition is limited to "garbage. . . and other discarded material . . . ." The regulations at 40 C.F.R. 261.2 elaborate the definition, indicating that a material is 'discarded' if it is abandoned, disposed of, burned or incinerated, treated, etc. Therefore substances which are retained or transferred or sold by the owner are not encompassed by the definition. Solid waste, as a practical matter, refers to material whose owner considers it lacking in commercial value.

The term "hazardous waste" is defined at RCRA section 1004(5) as "solid waste, or conbination of solid wastes, which because of its quantity, concentration or physical, chemical, or infectious characteristics" may cause or significantly contribute to death or serious irreversible or incapacitating reversible illness or pose a substantial hazard to human health or the environment. The Agency has interpreted the statute through regulations at 40 C.F.R. 261.30. Certain dangerous waste streams are excluded from the definition of hazardous wastes by regulation (e.g., fly ash waste generated from burning coal or other fossil fuels, drilling fluids, certain tannery wastes, mining wastes, etc. See 40 C.F.R. 261.4.)

To qualify as a hazardous waste under RCRA, material must either be a listed hazardous waste or meet criteria established by EPA for "characteristic" hazardous waste. The characteristics (ignitibility, corrosivity, reactivity, EP toxicity) are narrowly defined by regulation. (See 40 C.F.R. 261.10, 261.20, 261.21, 261.22,261.23, and 261.24.) For example, EP toxicity is limited to solid wastes which under specified test methods contain contaminants of 14 substances (arsenic, barium, cadmium, chromium, lead, mercury, selenium, silver, endrin, lindane, methoxychlor, toxaphene, 2,4-D and 2,4,5-TP Silvex) in excess of specified concentrations. Thus, many substances which are widely regarded by toxicologists as toxic may nevertheless not meet the criteria set forth at 40 C.F.R. 261.24 for EP toxicity.

The listed hazardous wastes are set forth in three categories: 14 wastes from non-specific sources, 75 wastes from specific sources, and several hundred "discarded commercial products and residues."

"Hazardous substances" under CERCLA are defined primarily by reference to other statutes. CERCLA hazardous substances are defined as substances designated under (A) section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) section 102 of CERCLA (defined as "such elements, compounds, mixtures, solutions and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment"), (C) wastes listed or having characteristics under RCRA, (D) any toxic pollutant under section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any substance regulated under section 7 of the Toxic Subtances Control Act.

The proposed list of designated hazardous substances under CERCLA was published May 25, 1983 at 48 Federal Register 23571-23601. A final rule was signed February 14, 1985, and appeared in the April 4, 1985 Federal Register. The final rule designates 698 CERCLA hazardous substances. It would therefore appear that the hazardous substance list is more extensive than the hazardous waste list. Even if the listed hazardous wastes were equally numerous, the crucial conceptual difference is that hazardous substances, unlike hazardous wastes, may well be commercially valuable products which have not been "discarded" or abandoned.

To give some relatively familiar examples of hazardous substances not regulated under RCRA, the pesticide malathion, heavily sprayed in California to prevent the spread of the Mediterranean fruit fly, is not a hazardous waste but it is a hazardous substance. (There are documented accounts of farmworker injury associated with heavy exposure.) Pesticides, although known to have adverse effects, are not RCRA wastes. (See enclosed list of pesticides from Senate Report 98-631, p. 157-8.) Some are also not CERCLA hazardous substances, but all should qualify under the CERCLA definition of "pollutants or contaminants."PCBs, polychlorinated biphenols, are listed hazardous substances but not listed hazardous wastes. Significant attention has been directed to the Agency's failure to list the various dioxins, even those considered as among the most toxic known man-made substances, as hazardous wastes, although they are hazardous substances. (The 1984 reauthorization of RCRA mandated that EPA decide whether to list certain obviously dangerous substances, including dioxins, as hazardous wastes. See Pub.L. 98-616, section 3001(e)(2).)

Therefore, we believe that an important part of the Superfund reauthorization is a provision for citizen suits to prevent imminent and substantial endangerments which may be presented by any "hazardous substance, pollutant or contaminant."

98th Congress *2d Session*	SENATE	Report 98-631

SUPERFUND AMENDMENTS OF 1984

REPORT

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

TO ACCOMPANY

S. 2892

together with

ADDITIONAL AND MINORITY VIEWS

September 21 (legislative day, September 17), 1984.—Ordered to be printed

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PESTICIDES IDENTIFIED FOR A REBUTTABLE PRESUMPTION AGAINST REGISTRATION WITH WASTE STREAMS REPORTEDLY NOT REGULATED BY RCRA

Benomyl
Diallate
Dimehtoate
EBDC
Ethylene Dibromide
EPN
Ethylene Oxide
Maleic Hydrazide
Pentachloronitrobenzene
1080
Strychnine Sulfate
Thiophante Methyl
Trifluralin
Captan
Carbaryl
DDVP
Methanearsonates
Naled
Paraquat
Piperonyl Butoxide
Rotenone
Triallate
Acrylonitrile
Aramite
Benzac
Chloranil
Chlordecone
Copper Acetoarsenite
DBCP
Diflubenzuron
Picloram
Amitraz
Chlorobenzilate
Pronamide

ATTACHMENT A

CHEMICALS HAVING SUBSTANTIAL EVIDENCE OF CARCINOGENICITY WITH WASTE STREAMS REPORTEDLY NOT REGULATED BY RCRA

2-Acetylaminoflourene
Acrylonitrile
4-Aminobiphenyl
Amitrole
Aramite
Auramine
Azaserine
Benz(c)acridine
Benz(a)anthracene
Benzidine
Benzo(a)pyrene
Benzo(b)fluoranthene
Benzo(j)fluoranthene
Chlorambucil
Chloroalkyl Ethers
Chlorobenzilate
Chrysene
Cycasin
Cyclophosphamide
Diallate
Dibenz(a,h)acridine
Dibenz(a,j)acridine
Dibenz(a,h)anthracene
7H-Dibenzo(c,g)carbazole
Dibenzo(a,e)pyrene
Dibenzo(a,h)pyrene
Dibenzo(a,i)pyrene
1,2-Dibromo-3-chloropropane
1,2-Dibromoethane
3,3'-Dichlorobenzidine
1,2-Diethylhydrazine
Diethylstilbestrol
3,3'-Dimethoxybenzidine
p-Dimethylaminoazobenzene
7,12-Dimethylbenz(a)anthracene
3,3'-Dimethylbenzidine
Dimethylcarbamoyl Chloride
1,1-Dimethylhydrazine
1,2-Dimethylhydrazine
2,4-Dinitrotoluene
1,4-Dioxane
1,2-Diphenylhydrazine
Ethylene bis Dithiocarbamate
Ethyleneimine
Ethylene Oxide
Ethylenethiourea
Ethyl Methanesulfonate
Formaldehyde
Hexachlorobutadiene

Hydrazine
Indeno(1,2,3-cd)pyrene
Iron Dextran
Isosafrole
Kepone
Lasiocarpine
Melphalan
Methapyrilene
3-Methylcholenthrene
4,4'-Methylenebis
Methyl Iodide
Methyl Methanesulfonate
N-Methyl-N'-nitro-N-nitrosoguanidine
Mitomycin C
Mustard Gas
1-Naphthylamine, technical grade
Nitrogen Mustard and its hydrochloride
Nitrogen Mustard N-oxide
  and its hydrochloride
5-Nitroquinoline-1-oxide
Nitrosamines
Pentachloronitrobenzene
Phenacetin
Pronamide
1,3-Propane Sultone
β-Propiolactone
Propylthiouracil
Safrole
Streptozotocin
2,3,7,8-Tetrachlorodibenzo-p-dioxin
Thioacetamide
Thiourea
o-Toluidine Hydrochloride
Toxaphene
Trichloroethylene
2,4,6-Trichlorophenol
Tris(1-aziridinyl)phosphine sulfide
Tris(2-3-dibromopropyl)phosphate
Trypan Blue
Urethane

The **Chairman**. You represent Public Citizen's Congress Watch?

Ms. **Hathaway**. That is right, sir.

The **Chairman**. Is that an organization or a corporation?

Ms. **Hathaway**. Public Citizen is a consumer organization founded by Ralph Nader in 1971.

The **Chairman**. How do you all raise your funds?

Ms. **Hathaway**. The fund-raising is from individual citizens who contribute to our organization.

The **Chairman**. Individual contributions?

Ms. **Hathaway**. That is correct.

The **Chairman**. Well, thank you very much for appearing and testifying, and if you will be kind enough to answer those questions, we would appreciate it.

Ms. **Hathaway**. You are very welcome. Thank you, sir.

The **Chairman**. Our next witness, and I believe the last witness, is Mr. Carl Schafer, Director for Environmental Policy, Office of the Secretary of Defense.

Mr. Schafer, have a seat. Mr. Schafer, could you take 5 minutes and present the thrust of your statement and we can put the rest in the record if you desire?

STATEMENT OF CARL SCHAFER, DIRECTOR FOR ENVIRONMENTAL POLICY, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER, INSTALLATIONS AND LOGISTICS

Mr. **Schafer**. Thank you, Mr. Chairman. We have submitted our written testimony for the record. With your permission, I will proceed.

The Department of Defense has an active and well-organized program to investigate and clean up inactive sites on military installations and formerly used lands. We are finishing up now preliminary assessments on 473 installations; conducting remedial investigations and feasibility studies at 123 installations, with 51 already completed; and conducting remedial actions at 38 sites. We have already completed cleanup at 24 sites.

We are spending about $260 million of appropriated funds this year, but expect ultimately to spend $5 to $10 billion over the next 10 to 15 years for cleanup.

We support citizen involvement in the process of planning the studies and cleanup actions, but are concerned about the implications of section 138 of S. 51, which provides for citizen suits.

There are significant differences from a technological point of view between this environmental program and others in the past. The potential costs here are enormous. The subject is technically and scientifically complex and there are few guideposts along the way.

At any given site, new discoveries or complications can radically change the course of our studies and present new problems or alternatives. Add to this intrinsic complexity our need to manage a national program of studies and cleanup. We must prioritize and focus attention on the most environmentally significant sites within the resources available, and we must do this within the context of our budget cycles, Federal acquisition regulations, compliance with the National Environmental Policy Act, and against the uncertainty of how clean is clean and how to achieve it.

My specific concern is that the provision for citizen suits, with other provisions of S. 51 requiring unrealistic time schedules, will have the unintended effect of disrupting overall program management.

We must work on the most environmentally significant sites, not the ones that happen to acquire local public interest. We cannot do it all in 1 year or even a few years, despite all that suits and court orders might desire, and we cannot guarantee specifically or generally that complications or changes in priorities will not happen.

What is certain is that with all the effort and goodwill that we can muster, we will nonetheless present many opportunities for suits simply as a function of scientific uncertainty and practical necessity.

The general urgency and specific local interest will undoubtedly produce efforts by other courts to accelerate studies and cleanups of local interests—in effect, to divert priority and resources from the national perspective to the local. The opportunity will therefore exist to see lesser priorities accelerated and higher ones languish, and especially to see unrealistic budget demands imposed that reflect cumulative local interests, all demanding me first.

In summary, our experience to date with this large and complex program prompts me to express concern that the provision for citizen suits will, in fact, be counterproductive to environmental protection. Thank you, sir.

[The prepared statement follows:]

STATEMENT OF
MR. CARL SCHAFER
DIRECTOR FOR ENVIRONMENTAL POLICY
OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
(MANPOWER, INSTALLATIONS AND LOGISTICS)

INTRODUCTION

Good morning, Mr. Chairman and members of the Committee. It is an honor and a pleasure to appear before you and have the opportunity to describe for you the Department of Defense (DoD) environmental protection programs.

In my testimony this morning, I will place the total DoD environmental program in perspective, and then focus on the Defense Environmental Restoration Program which was established in Fiscal Year 1984.

DEFENSE ENVIRONMENTAL PROGRAM SCOPE

The Department of Defense's environmental program includes three principal areas: pollution abatement, natural resources management, and pest management. The pollution abatement area focuses on compliance with all federal environmental laws and regulations as well as on waste stream reduction. The most recent data available from the Environmental Protection Agency shows that at the end of fiscal year 1984 DoD had achieved 100% compliance for our major air pollution sources and 86% for our major water pollution sources.

We manage 24 million acres of land for all compatible uses. Our goal is to conserve and protect these lands while simultaneously obtaining maximum economic use of the lands. All installations have natural resources management plans which integrate complementary land uses compatible with our military mission. During the past two years, we have increased policy guidance and program monitoring aimed at prolonging and diversifying our use of public lands. We request no special appropriation to accomplish these goals. Instead, we finance our needs from O&M appropriations supplemented by income from sales of forest products, hunting and fishing fees, and agricultural outleases. In Fiscal Year 1984, we sold $14 million worth of forest products, we distributed $1.4 million to host states, and deposited $1.4 million in the Treasury. We also collected $15 million in cash and services from agriculture outleases, and about $1.5 million in outdoor recreation user fees. All of these proceeds are spent on maintenance of and improvements to natural resources.

The Pest Management Program protects DoD personnel from disease and our property from damage. We apply the best available scientific technology to the challenge of monitoring disease vectors all over the world, and protecting about $350 billion worth of facilities and stored products from pest damage. We are leaders in this area. Our Armed Forces Pest Management Board and our Aerial Spray Flight capability are high-value national resources. Board meetings are regularly attended by Department of Agriculture, Environmental Protection Agency (EPA), and Department of Health and Human Services people. The work of the Pest Management Board and Defense health professionals is responsible for our leading position in the assessment and control of indoor air pollution problems due to the termiticide, chlordane, and other pesticides.

DEFENSE ENVIRONMENTAL RESTORATION PROGRAM

Of particular interest are the Department's programs to manage and clean up hazardous waste. In Fiscal Year 1984 Congress consolidated and expanded these programs as a separate appropriation entitled The Defense Environmental Restoration Account under the Defense Appropriations Act. Specifically the Congress provided authority for the Department to spend money on lands not currently under DoD custody or on which DoD had conducted operations at some time in the past and caused a problem requiring cleanup. This funding level allowed us to accelerate our work and also to add a research and study component to the program. In Fiscal Year 1985, $314 million were appropriated and additional language was added to provide programming flexibility by allowing us to spend the money during the fiscal year on our most important projects without being bound by expenditure rate requirements. The amount requested for FY 1986 is $329 million. Figures 1 and 2 show how we spent the appropriation in FY 1984 and our program for FY 1985 respectively. Figure 3 shows our planned distribution of the $329 million of Operation and Maintenance funds we have requested for FY 1986.

I will now review the program's four elements and our plans to carry out the work they encompass.

A. Installation Restoration

The first of the four elements is the Installation Restoration Program to identify and clean up hazardous waste disposal sites on both active installations and formerly used lands. This program responds to the requirements of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), commonly known as "Superfund." As you know, federal agencies are not eligible routinely to receive rememdial funding under this Act for response actions, but must comply with the cleanup requirements described in the Act. We have been funding cleanups from our operations and maintenance or procurement appropriations. In Fiscal Year 1983, we spent $23 million in investigations, engineering studies, and cleanups or other remedial actions. In Fiscal Year 1984, under the augmented Environmental Restoration appropriation, we spent $74 million and intend to spend $199 million in FY 1985.

The Cornhusker Army Ammunition Plant in Nebraska shows how the restoration program operates. The Army completed a comprehensive records search and groundwater monitoring at the Plant. Small concentrations of waste chemicals were discovered in drinking water wells in a suburb of nearby Grand Island, Nebraska. The Army notified federal, state and local health authorities, and offered bottled water supplies to about 85 families. All this was accomplished within a few weeks after we identified the contamination problem. Within a few months, the Army had arranged for an extension of the local water supply and provided $5 million to the city to extend municipal water service to the affected residents. This is a good example of how the restoration account enables us to move quickly to relieve the affected public of the effects of contamination even before the cleanup action begins.

We are working closely with EPA to assure our Installation Restoration Program is consistent with their approach in Superfund. Last year, together with the states and EPA regions, we nominated 60 DoD sites which it was felt might score high enough for inclusion on the National Priorities List (NPL). Only half (33) of these actually were determined to be of NPL scope. EPA has recently evaluated another 10 of our bases for possible inclusion on the NPL and determined that 6 should be proposed for inclusion. Putting DoD sites on the list would not make us eligible for Superfund monies, but it will place our sites in national perspective. On the basis of what we know now, approximately 50 of approximately 1,800 sites to meet NPL criteria, which would make DoD less than three percent of the NPL. Additional sites on DoD installations may eventually require some form of remedial action, although at a much reduced scope from NPL sites.

The Installation Restoration Program itself is designed to identify and clean up hazardous waste dump sites and halt migration of pollutants. We have a four-phase approach for this purpose at our installations. Phase I is an initial assessment to identify all potential sites. It includes a detailed records search and interviews with current and retired employees, and anyone else who may have information. In 1980, we established a goal to complete the assessments identified at that time by the end of Fiscal Year 1985. We will not only meet that goal but, as shown in Appendix A, we are now over 75% of the way toward completing all known assessment requirements. At the conclusion of Phase I, we evaluate the information gathered and prioritize the sites for further investigation. The worst sites would be the first for more detailed study. A report of these findings and recommendations is published. No sites are eliminated, even if they don't score high enough for NPL listing. If a site presents a potential for contamination to people or the environment, it is considered in the next phase. Phase II is a physical survey at potential problem sites. It typically includes placement of monitoring wells, sampling and chemical analysis, and other field work. The purpose of Phase II is to define the nature of the pollutants and the scope and extent of the contamination. It is called the "confirmation phase." As Appendix A shows, DoD has started about 180 Phase IIs and completed 51. When Phase II is finished at an installations, we publish our findings in a report. We have also decided that it is appropriate to rescore the sites after Phase II to ensure that cleanups are directed to the most important sites first.

Both Phase I and Phase II reports are made available for review by EPA and State environmental agencies. The Phase II work may conclude there is no need for remedial action, or that some remedial action is required. This decision is made with EPA and State input. Phase III, technology development, is an optional step. It comes into play if cleanup technology doesn't exist or if new standards need to be developed. Phase IV is the actual remedial measures; it includes project design, construction, and execution. Our goal in DoD is to have all construction required for cleanups underway by 1993. This is ambitious, since some complex problems don't present obvious solutions.

Installation Restoration Program Cost

In early 1984 the services were asked to estimate their costs for hazardous waste dump site cleanup (the "Installation Restoration Program"). With little or no experience, few studies in progress, and no EPA or industrial data to draw on, the estimates added up to $1.6 billion.

In December 1984, EPA issued a blockbuster-sized report required by CERCLA on a number of subjects, including cost experience and/or estimates for site study and cleanup. In the meantime, our own level of understanding has increased dramatically. Using the EPA cost data and our own information on the number of sites we have, plus projects that will result from studies in progress, we now estimate $5-$10 billion. Note that

Rocky Mountain Arsenal is included separately in that figure because of its great cost.

The uncertainty in this figure is because we still have about 271 Phase II studies in progress or to be started. Costs can only rise and likewise the number of sites.

The next logical question is "how does this compare with the Superfund program?"

The real answer is that we used their technical cost experience data per site, but the population of sites and fiscal responsibility are so different that no good comparison can be made. To amplify:

"population of sites" - Superfund applies only to those on the NPL; DoD has only 30 sites proposed for the NPL, but we've got to clean up all our sites, NPL or not. So our population will include many small sites as well as big ones.

"fiscal responsibility" - Superfund pays largely for "orphan sites" and even there pays a maximum of 90% (States pay the rest). Further EPA estimates 40% of the NPL will be paid for by private owners (i.e, are not orphans). DoD has to pay the total cost for all its sites.

B. Building Demolition and Debris Removal

The second element of the Environmental Restoration Program is almost entirely new, and was added by Congress in the 1984 Defense Appropriations Act. It includes removal of unsafe, unsightly, and dangerous buildings and structures, and other debris from active installations, inactive installations, and lands which were formerly used by DoD. While we have been working for over five years to clean up a few selected inactive sites, we had no comprehensive plan to identify and eliminate problems. This was partly because of lack of authority to spend money on lands which we do not control.

The appropriation is helping us clean up a wide variety of former sites. An example is the quick action taken by the Air Force in cooperation with EPA to respond to groundwater contamination apparently caused by past Air Force activities at the former Olmsted Air Force Base, Pennsylvania. The Air Force is using the appropriation to fund monitoring studies and a permanent alternate water supply to 12 families whose wells have been affected.

We have assigned the Army to manage the formerly-used sites program because of their recognized expertise and ability to manage complex projects, and their presence in virtually every state. The execution of this program is carried out through the US Army Corps of Engineers.

In order to deal with formerly-used sites comprehensively, we have solicited nominations of candidate sites from each state governor through the National Governors' Association, from EPA, and other federal agencies. The Department of the Interior (DoI) has been especially helpful. Over 120 DoI sites are now being studied by the Army Corps of Engineers. The inventory of former and inactive sites currently under investigation is attached as Appendix B. In Fiscal Year 1984, the first year of this program, we began assessments at 41 sites and will add 200 more in 1985. A potential universe of 2,000 sites exists.

Of particular interest under the building demolition and debris removal program are the many training sites, including artillery and bombing ranges that were created during World War II and which may require some action to protect the public safety. These facilities were created whenever and wherever there was a need and today you can find an old pilot training base still standing, more or less, in the middle of a national forest. Similarly, millions of acres of public property were used as necessary for various types of ordnance ranges. These are especially troublesome because of the very limited technology available for large area cleanup of unexploded ordnance. We are funding under this program an intensive development program to advance the state of the art of both the detection and the recovery technology necessary to clean up such property.

C. Hazardous Waste Disposal

The third element of the program is hazardous waste disposal. Its purpose is the environmentally safe transportation, storage, treatment, and disposal of hazardous wastes which are currently being generated by DoD activities. This is accomplished primarily by contract with private industry to pick up and haul our hazardous waste to approved disposal facilities. A very high priority here is to be sure that the contractors live up to the requirements of the contracts. Accidental or improper contamination of the environment with these hazardous wastes could cost hundreds of thousands and millions of dollars to clean up. For instance, at Fort Lewis a few hundred gallons of PCBs dumped on our lands by an unknown person resulted in the contamination of 1,850 tons of soil. We cleaned up the mess in eight days, but it cost us nearly half of million dollars. We therefore take extraordinary efforts to see that our own contractors do the right thing. These efforts include cradle-to-grave manifesting of the cargo and rigid accounting for every pound of material and actual surveillance of the performance of our contractors in their work. In about 15% of these transportation activities our contractors are actually followed by other contract employees to be sure that the waste is being delivered to an approved facility in a safe manner. Prior to having our own surveillance contractors in place, EPA's National Enforcement Investigation Center in Denver, Colorado, had provided assistance by performing this function and training our own employees to do so as well. The Defense Criminal Investigative Service (the investigative arm of the DoD Inspector General) has made deterrence of improper hazardous waste disposal a high priority enforcement item. For example, in April 1984, a DLA hazardous waste contractor was indicted by a federal grand jury for making false claims to the government in connection with a hazardous waste disposal contract.

The Defense Environmental Restoration appropriation in Fiscal Year 1984 included $32.2 million for hazardous waste disposal and another $35.6 million is programmed for fiscal year 1985. Most of this goes directly to DLA for disposal of waste generated by the military services. However, in the past two years we have been faced with the requirement to dispose of millions of pounds of PCBs including American manufactured PCBs from overseas installations. This cost us $10 million in 1984 and is estimated to cost $8 million in 1985.

D. Other Hazardous Waste Operations

The fourth and final element encompasses a number of initiatives to improve our long-range program management and reduce the probability that we will need to clean up sites as a result of today's activities. It is the smallest element, accounting for less than one percent of the appropriation in Fiscal Year 1985, but the potential pay-off is huge. We are actively pursuing finding ways to reduce the amount of hazardous wastes that we are generating on our military bases. This work can easily pay for itself many times over. We will save money by avoiding a disposal bill and by re-using materials such as solvents. We plan to achieve total solvent recycling by 1986. This will reduce the total DoD waste stream by about one-fourth. The biggest pay-off will be in minimizing our future potential liability associated with hazardous waste handling and, inevitably, mishandling. If we don't generate it, we won't mishandle it, dispose of it or pay to clean it up years from now.

We are funding research and development to find safer, cheaper, and more effective ways to clear lands of unexploded ordnance. The Department of the Interior has already identified over 4 million acres of their land which may be contaminated with unexploded DoD ordnance. We have almost as much ordnance-contaminated land on our own rolls and could sell some of it if we could decontaminate it cost-effectively. We need to develop better technology, and with the Environmental Restoration Program, we have begun to do so. This last point is important because we are sharing technology for remote detection of buried materials with EPA. While we are primarily interested in finding buried shells and bombs, EPA needs to develop better techniques for locating buried drums.

The Defense Environmental Leadership Project was established in January 1984 to develop innovative solutions to long-term environmental problems. Simply stated, the purpose of the Project is to improve DoD's national leadership position in environmental protection - to improve compliance and reduce wastes. The project team has taken on some tough issues - problems like hazardous waste management, groundwater protection, risk assessment, used oil management, and environmental audits. The Leadership Project has taken some important first steps in 1984: improvements have been made in our hazardous waste management and our conforming storage programs; a Used Solvent Elimination Program has been established and is being implemented by the military services; and policy guidance was developed for several critical environmental issues such as groundwater protection, leaking underground storage tanks and environmental audits. The Leadership project served as a focal point for negotiations in a compliance agreement with the EPA for eliminating the backlog of PCBs for disposal. DoD disposed of more than 8 million pounds of PCBs in 1984 at a cost of about $10 million. In 1985, many tasks started in the past year will bear fruit and several new initiatives will continue to improve DoD's national leadership position in environmental protection. High priority efforts include: development of an incentives program for pollution abatement waste reduction projects providing venture capital for fast payback projects with return on investment to installation operating funds; a demonstration project will be set up for successful modifications to industrial processes for hazardous waste reduction; an installation level decision making guide for used oil recycling programs will be developed; and environmental auditing programs will be implemented by the military services. I expect additional payoffs in terms of our overall level of compliance and in hazardous waste reduction from the work going on in the leadership project.

DEPARTMENT OF DEFENSE-ENVIRONMENTAL PROTECTION AGENCY RELATIONS

During the past two years the communications between DoD and EPA have improved greatly. We have assigned a liaison officer to EPA for ten years and are currently negotiating for the assignment of an EPA officer on my personal staff.

We have a Memorandum of Understanding with EPA on CERCLA which has established the administrative and jurisdictional framework for remedial actions on or near Federal facilities. This memorandum, a copy of which is included as Appendix C, has allowed us to get on with the job of cleaning up our sites while simultaneously maintaining an appropriate cooperative and responsive relationship with EPA. We have already started discussions with EPA to renew this memorandum immediately upon passage of Superfund reauthorization.

We regularly provide EPA and interested parties a base-by-base status report on our Installation Restoration program. We share with EPA the technical details of our remedial action plans. We are committed to doing the cleanup job right, and EPA participation is helping us fulfill that commitment.

Through the A-106 process, EPA annually reviews our budgeting for environmental work and advises the Office of Management and Budget of its adequacy.

In sum, DoD and EPA are cooperating to speed national environmental cleanup. I believe we should lead the effort together, and we will continue to work to assure we achieve compliance not only with the letter, but the spirit of the law.

IMPACT OF SENATE BILL S.51

The Department of Defense has taken on a responsible leadership role in environmental matters. We are interested in finding and applying innovative technical and administrative solutions to environmental problems. Our substantial environmental program increases, in the Defense Environmental Restoration Program appropriation, demonstrates our commitment.

We believe that the Congress has acted wisely to establish the Defense Environmental Restoration Account. We in DoD are pleased to play a leading role in the national effort; we are proud of what we have done already; and we enthusiastically accept the challenge to do more. We believe the benefits of DoD participation go far beyond providing places where our people can live and work more productively but will benefit the quality of life for our neighbors and the whole nation.

Unfortunately, the synergistic effect of the provisions contained in sections 137 and 138 of S51 may have a deleterious effect upon the DoD hazardous waste site cleanup program.

Section 137 of S.51 would provide for establishing schedules for the undertaking by Federal agencies of preliminary assessments, remedial investigation and feasibility studies, the entering into of cleanup compliance agreements between the responsible Federal agency and EPA, and the start of remedial action. DoD is convinced, based upon considerable experience, that the schedules imposed by S.51 cannot realistically be achieved due to the time needed to sample and analyze field data. In addition, remedial investigations sometimes identify additional releases of hazardous substances at a site which in turn require additional, unanticipated laboratory analyses and engineering work before remedial action can begin. DoD's experience indicates that the minimum time required for a remedial investigation (assuming funds are immediately available) is 18 months and that confirmation of the contaminated site characteristics (what's there, and how much of it, where's it going, etc.) will usually take 2 to 3 years.

The citizen suit provisions contained in section 138, when coupled with the effect of section 137 with its rigid time frames for specified events, will likely lead to many court actions and unrealistic requirements for the cleanup of individual DoD installations. In this manner, DoD's ability to establish reasonable priorities for CERCLA projects, the Administration's flexibility to budget, and Congress's discretion to apportion based upon the degree of risk posed to public health and safety all will be impaired. In order to meet requirements on specific CERCLA sites, DoD may be forced to delay or defer other cleanup work even though the risk to public health and safety may be greater. Also, by "locking in" cleanup requirement, other defense mission requirements may be affected.

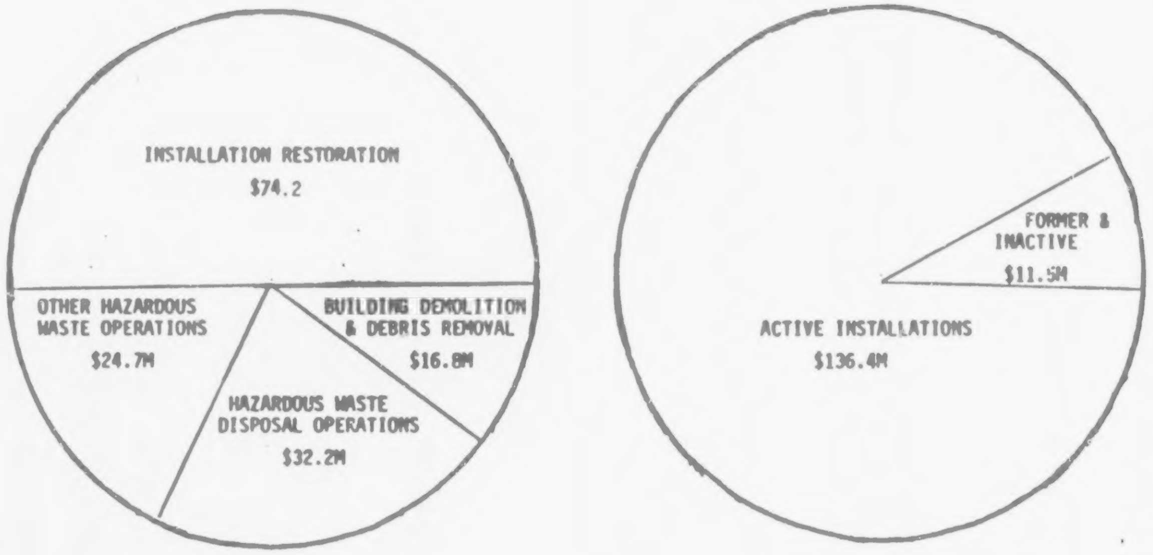
Section 137 also has other problems. For example, it requires agencies to submit annual budget requests for funding adequate to complete remedial action, and it purports to restrict the power of the President to redelegate certain Executive Branch authorities to agencies other than EPA. DoD believes that these provisions impermissibly interfere with Presidential authority. Moreover, these provisions, combined with the citizen suit provision, may well result in Courts impermissibly interfering with the President's authority.

CONCLUSION

Considering the demonstrated commitment of the Department of Defense to hazardous waste site cleanups and the potential disruptions to this program, it would not apprear that sections 137 and 138 will benefit the cause of environmental cleanup and protection.

FIGURE 1

FY 1984 DEFENSE ENVIRONMENTAL RESTORATION



FUNCTIONAL DISTRIBUTION

FORMER/ACTIVE DISTRIBUTION

FIGURE 2

FY 1985 DEFENSE ENVIRONMENTAL RESTORATION

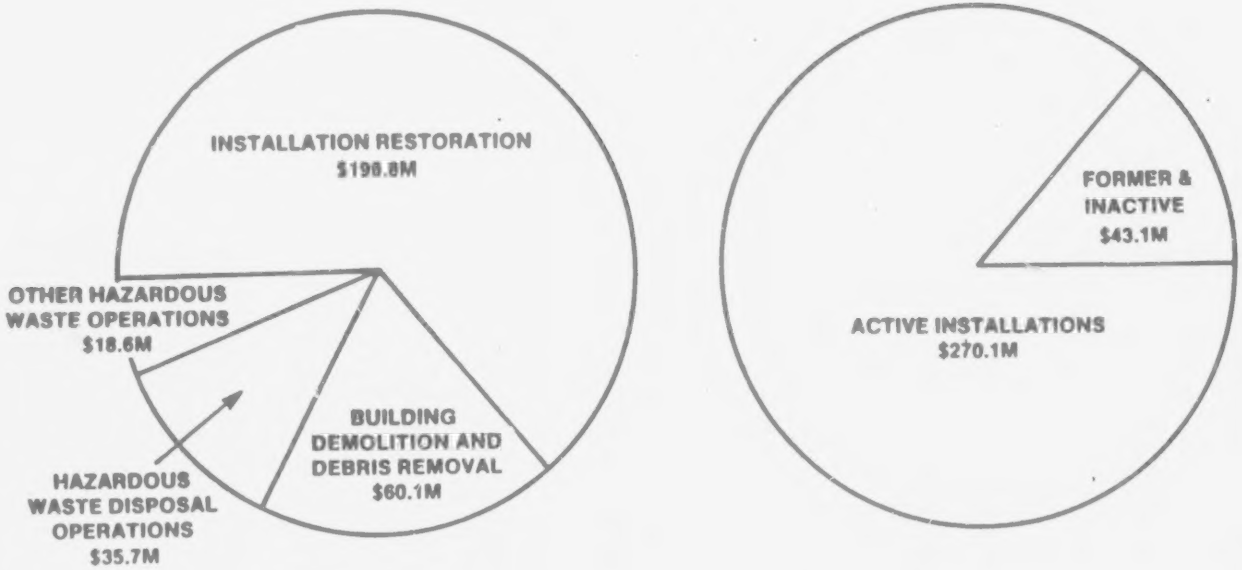
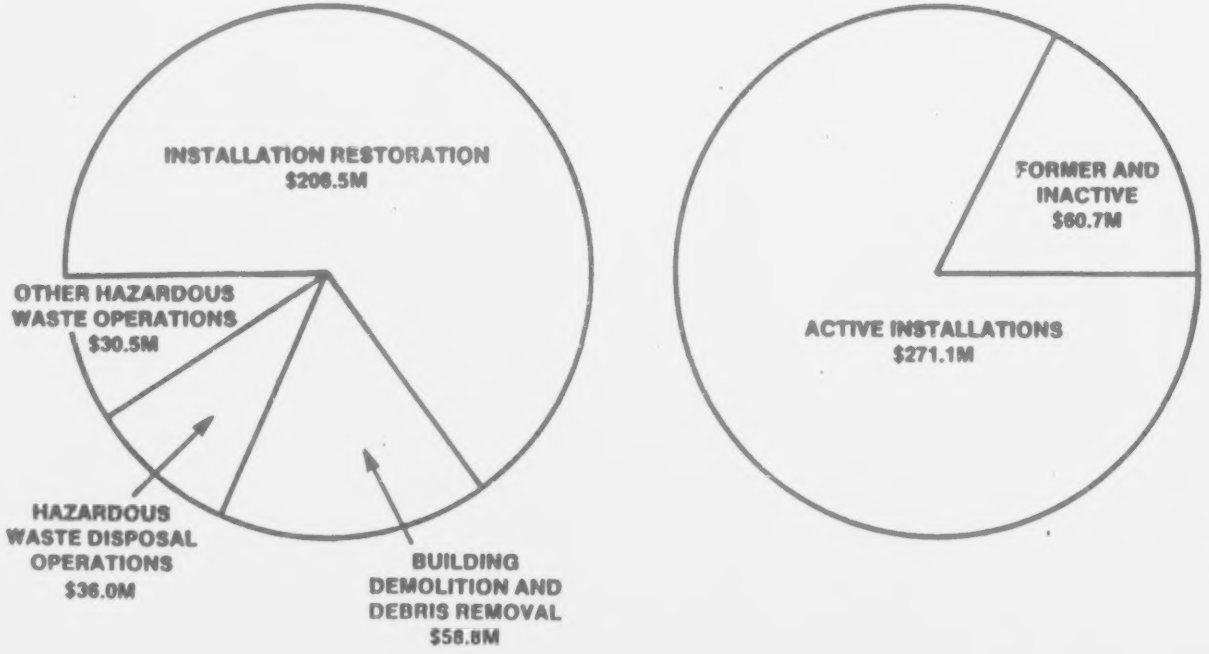


FIGURE 3

FY 1986 DEFENSE ENVIRONMENTAL RESTORATION (PROJECTION)



Quantitative Summary of Department of Defense Installations Restoration Program

as of September 30, 1984

	Phase I			Phase II			Phase III/IV		
	Req'd	Underway	Compl	Req'd	Underway	Compl	Req'd	Underway	Compl
Army	181	2	169	53	15	32	18	6	5
Navy/Marine Corps	109	15	58	52	31	3	18	1	4
Air Force	158	31	104	86	76	10	33	28	0
Defense Logistics Agency	25	0	25	13	7	6	3	3	0
Total	473	58	356	204	129	51	72	38	9

1985
FORMER SITES INVENTORY

NAME	LOCATION
GATEWAY NAT'L REC AREA	NEW YORK
HIGHLAND ARMY AIR DEFENSE	MIDDLETOWN, NJ
NIKE SITE N-63	DRINER, VA
FORT CRONKITE	GOLDEN GATE NAT'L PARK, CA
RICHMOND NAVAL AIR STATION	MIAMI, FL
NIKE CD-27	WILMINGTON, OH
CRISSY FIELD	GOLDEN GATE NAT'L PARK, CA
PUUIKI BEACH	MAKULAIA, HI
CAMP KILOHANA	KILOHANA, HI
RACO AAF	SALTE ST MARIE, MI
USGC-MARBLEHEAD	MARBLEHEAD, OH
CRAIG AFB	SELMA, AL
NIKE SITE CL-13	WILLOWICK, OH
NIKE SITE CL-11	PAINESVILLE, OH
NIKE SITE CL-34	WARRENSVILLE, OH
TWO CREEKS AFS	TWO CREEKS, WI
BROOKLEY AFB	MOBILE, AL
WASHINGTON GAP FILLER	WASHINGTON CO, IA
LAMOTTE GAP FILLER	JACKSON CO, IA
BOWLING GREEN GAP FILLER	PIKE CO, MO
ELLSWORTH GAP FILLER	ELLSWORTH CO, KS
GARLAND GAP FILLER	BOURBON CO, KS
KING CITY GAP FILLER	ANDREW CO, MO
MANKATO GAP FILLER	JERVELL CO, KS
MARQUAND GAP FILLER	MADISON CO, MO
VICHY GAP FILLER	MARIES CO, MO
WILSEY GAP FILLER	MORRIS CO, KS
WINFIELD GAP FILLER	CROWLEY CO, KS
MADISON BARRACKS	SACKETS HARBOR, NY
NIKE SITE N-36	VIRGINIA BEACH, VA
NIKE SITE NO. 93	MAHWAH, NJ

APPENDIX 8

BATTERY C, 4TH/MISSILE PA	NEWPORT NEWS, VA
NIKE SITE NY-09	HARRISON, NY
RARITAN ARSENAL	EDISON, NJ
BELLE MEADE DEPOT	SOMERVILLE, NJ
SOMERVILLE DEPOT	SOMERVILLE, NJ
BUFFALO OUTER HARBOR	BUFFALO, NY
OYSTER POINT STORAGE AREA	VA
FT JOHN CURTIS	VA
FT WOOL AREA	FT MONROE, VA
HAMPTON ROAD A. TERMINAL	VA
NANSEMOND ORD WORKS	VA
NASA PLUM TREE ISLAND SITE	PLUM TREE ISLAND, VA
AF PLANT NO. 80	SALTVILLE, VA
ALESHIRE 9M DEPOT	REMOUNT, VA
BYRD FIELD	VA
CAMP PATRICK HENRY	VA
CAMP PENDLETON	VA
NIKE SITE NY-25	BROOKHAVEN, NY
NIKE SITE BU51/52	HANBURG, NY
FISHERMAN ISLAND	CAPE CHARLES, VA
CULTIS BAY STORAGE AREA	BALTIMORE, MD
NIKE SITE BA-09	FORK, MD
NIKE SITE W-25	DAVIDSONVILLE, MD
NIKE SITE W-26	ANAPOLIS, MD
NIKE BA 30-31	CHESTERTOWN, MD
NIKE SITE W-36	UPPER MARLBORO, MD
NIKE SITE W-35	UPPER MARLBORO, MD
NIKE SITE W-43	UPPER MARLBORO, MD
NIKE SITE W-44	WALDORF, MD
NIKE SITE W-45	LA PLATA, MD
NIKE SITE W-54	LA PLATA, MD
NIKE SITE BA77/W-05	GRANITE, MD
NIKE SITE W-92	ROCKVILLE, MD
NIKE SITE 3A-92	TOWSON, MD
NIKE SITE W-93	OLNEY, MD
NIKE SITE W-94	ROCKVILLE, MD

SEABEE TNG FAC, QUONSET PT	DAVISVILLE, RI
NIKE SITE	WEST HAVEN, CT
NAV AUX FIELD	CHARLESTOWN, RI
WHITE MOUNTAIN WAR CAMP	WHITE MT NAT'L FOREST, NH
NIKE SITE 19	REHOBATH, MA
WALLFLEET AIR STA	CHATHAM, MA
DOVER AFB TARGET RANGE	SMYRNA, DE
NEWPORT NAVAL CANAL	SACHULST POINT, RI
NIKE SITE 94	SHELTON, CT
MANHATTAN ENGR DIST	PALOS PARK FOREST PRESERVE, IL
USCG RADIO STATION	NORTH BROOK, IL
NIKE SITE	GRAFTON, IL
CAMP LOGAN	ZION, IL
NIKE SITE	CHICAGO, IL
NIKE SITE D-06	UTICA, MI
FT CUSTER TNG AREA	FT CUSTER, MI
NIKE SITE D-87	UNION LAKE, MI
NEAH BAY GUN PLACEMENTS	WI
NIKE SITE	VASHON, WA
NIKE SITE	N. SEATTLE, WA
NIKE SITE	RICHMOND, WA
NIKE SITE	AOUGAN MTN, WA
NIKE SITE	YOUNG'S LAKE, WA
NIKE SITE	OLLALA, WA
NIKE SITE	KINSLOW, WA
NIKE SITE	KINGSTON, WA
BUHL NG RIFLE RANGE	ID
BOEING TEST FACILITY	TULALIP, WA
WESTERN PROCESSING HAZARDOUS WASTE DISP SITE	KENT, WA
KINGSBURG, ORD PLANT	LAPORTE CO, IN
ERIE PROVING GROUND	PORT CLINTON, OH
OHIO RIVER AND WORKS	HENDERSON, KY
CINCINNATI AF POL	CINCINNATI, OH
DUCK RIVER CHEMICAL PLT	COLUMBIA, TN
MAURY CWS PLANT	COLUMBIA, TN

LOUISVILLE ARMY DEPOT	LOUISVILLE, KY
MADISONVILLE GAP FILTER	HOPKINS CO, KY
NICHOLS GENERAL HOSPITAL	LOUISVILLE, KY
NICHOLS SPT FAC	LOUISVILLE, KY
NIKE SITE 48	GARY, IN
CASAD ENGR. DEPOT	FT. WAYNE, IN
NIKE SITE 63	DEARBORN CO, IN
NIKE SITE 48	GARFIELD HEIGHTS, OH
NIKE SITE 69	ROCKY RIVER, OH
FORT HAYES	COLUMBUS, OH
LIMA ARMY MOD CTR	LIMA, OH
MARION ENGR DEPOT	MARION, OH
AF FUEL FARM	WINDSOR LOCKS, CT
AMMUNITION PLANT	GORDORA, TN
MILLINGTON POWDER PLANT	MILLINGTON, TN
AMERICAN MEMORIAL	GUAM
SUPPORT CTR ELIZABETH CITY	ELIZABETH CITY, NC
RICHMOND NAVAL AIR STATION	PERRINE, FL
SNODGRASS HILL	FT. OGLETHORP, GA
FT. SUMTER	FT. SUMTER, SC
HARRIS NECK NWR	GA
WINSLOW AFS	WINSLOW, AZ
NAS LITCHFIELD	LITCHFIELD PARK, AZ
REQUA AIS	CA
UPPER LAKE DISTRICT NV CP	MENDACINO NAT'L FOREST, CA
BUSHNELL ARMY HOSPITAL	BRIGHAM CITY, UT
FT APPACHE	WHITERIVER, AZ
FRANCONIA RADAR STA	MOHANE CO, AZ
UPPER RAINBOW BASIN	CA
SILVER PEAK	CA
RED MOUNTAIN	CA
MINE RESERVE DOA BLDG	JAY, UT
ATLAS MISSILE SITE	ATLAS, OK
SANDIA BASE	PHIL CHARCON PK, NM
ARKANSAS ORD WORKS	JACKSONVILLE, AR
CONTINENTAL DIVIDE AFS	THOREAU, NM

US NAVAL AMMUNITION DPT	EAST CAMDEN, AR
MAUMELLE ORD DEPOT	MAUMELLE, AR
FT WINGATE	FT WINGATE, NM
FORT HOOD SEWAGE TRMNT PLT	KILEEN, TX
CRAB ORCHARD NWR	CARTERVILLE, IL
HARBOR DEFENSE	FT STARK, NH
LAKE ONTARIO ORD WKS	NIAGARA FALLS, NY
VARIOUS NIKE SITES	---
NIKE SITE BD-50	BOSSIER CITY, LA
NIKE SITE BD-10	BOSSIER CITY, LA
BONNET CARRE SPILLWAY	ST. CHARLES PARISH, LA
DELHI GAP FILLER	FRANKLIN PARISH, LA
LAKE CHARLES GAP FILLER	LAKE CHARLES, LA
BARKSDALE COMM ANNEX	BOSSIER CITY, LA
NEW ORLEANS GAP STATION	MT
O'FALLEN RADAR STA	NEW ORLEANS, LA
NAVAL AIRFIELD	OLATHE, KS
FEDERAL CENTER	KANSAS CITY, MO
MINUTEMAN MISSILE SITE	ARAPAHO NAT'L FOREST, CO
BLOOMFIELD GAP FILLER	BLOOMFIELD, NE
DALLAS CENTRAL GAP FILLER	DALLAS CO, IA
JOHNSTON ISLAND NWR	PACIFIC ISLAND
SUPPORT CTR ELIZABETH CITY	ELIZABETH CITY, NC
HARRIS NECK NWR	GA
FT CROTER REC AREA	MACOMB CO, MI
QUARTERMASTER DEPOT	JEFFERSON, IN
CAMP LOCKETT	CAMPO, CA
FT. CHORD PARK	CA
CASTNER RANGE	FT BLISS, TX
DYESS AFB	ABILENE, TX
METAGORDA RANGE	METAGORDA IS, TX
LA ORD DEPOT	SHREVEPORT, LA
LAFAYETTE NG TARGET	LA
BLACKHILLS ORD DEPOT	IGLOO, SD
FAIRMONT PREC BMB PG	MERRICK COUNTY, NE

CEDAR RAPIDS TARGET RANGE	JOHNSON CO, IA
NEEDLES LAND MGT AREA	NEEDLES, CA
BREEZY HILL ARTILLERY RANGE	KISATCHE FOREST, LA
CAMP SHELBY	DESOTO NAT'L FOREST, MS
LOVELL NG TARGET RANGE	LOVELL, WY
LANDE NG TARGET RANGE	LANDE, WY
CASPER PRECISION BOMBING RANGE	SIOUX COUNTY, NE
FAIRMONT PRECISION BOMBING RANGE	MERRICK COUNTY, NE
GRAND IS PRECISION BOMBING RANGE	MERRICK COUNTY, NE
LANGLEY MILITARY AIRFIELD	VA
NEW POINT COMFORT FIRING RANGE	VA
CAPE CHARLES BOMBING RANGE	CAPE CHARLES, VA
SEAL ISLAND NWR	DOCKLAND, ME
RED LAKE GUNNERY RANGE	MN
POW CAMP	RUSTON, LA
CHENNAULT AFB	LAKE CHARLES, LA
DARDENNES BAND CUT-OFF	IBERVILLE, LA
JACKSON BARRACKS	ST BERNARD, LA
BATON ROUGE ENGR DEPOT	BATON ROUGE, LA
LAFAYETTE TRAGET RANGE	LA
SHREVEPORT QM DEPOT	SHREVEPORT, LA
FT OMAHA	DOUGLAS COUNTY, NE
FT ROBINSON	DAVES COUNTY, NE
GRAND ISLAND AAF	HALL COUNTY, NE
LINCOLN RADIO BEACON ANNEX	LANCASTER COUNTY, NE
GRAND ISLAND MUNN AP	HALL COUNTY, NE
SIOUX ARMY DEPOT	CHEYENNE COUNTY, NE
ALGONA POW CAMP	KASOUTH COUNTY, IA
CLARINDA POW CAMP	PAGE COUNTY, IA
US RNG LIVESTOCK EXP	MILES CITY, MT
ROMAN HUSKA MOUT	CLAY CENTER, NE
PLUM ISLAND ANIMAL CTR	ORIENT POINT, NY
SW LIVESTOCK RESEARCH	FT RENO, OK
KANSAS CITY RESEARCH CTR	JACKSON COUNTY, MO

NIKE SITE 16	NORFOLK, VA
NIKE SITE 02	NORFOLK, VA
NIKE SITE 75	RESCUE, VA
REHAB CENTER	WATERBURY, RI
QUONSET POINT NAVAL AIR STATION	WATERBURY, RI
NATICK LAB ANNEX	SUDBURY, MA
CAMP BRADY	MI
FT. CUSTER	MI
FT GRANT	MI
NIKE SITE 44	CHICAGO, IL
NIKE SITE C-49	HOMEWOOD, IL
NIKE SITE C-54	ORLAND PARK, IL
NIKE SITE C-61	ARGONNE LAB
NIKE SITE C-72	ADDISON, IL
NIKE SITE C80181	ARLINGTON HTS, IL
NIKE SITE C-84	PALATINE, IL
NIKE SITE C92194	LIBERTYVILLE, IL
NIKE SITE C-93	NORTHFIELD, IL
NIKE SITE C-98	FT SHERIDAN, IL
NIKE SITE SL-10	MARINE, IL
NIKE SITE SL-40	HECKER, IL
NIKE SITE SL-90	GRAFTOR, IL
COMO FORGING PLANT	ST PAUL, MN
FT MCCOY TRNG AREA	MONROE COUNTY, MN
BARABOO STORAGE STATION	BORABOO, WI
AIR FORCE PLANT #58	WI
GARFIELD PLANT	DECATUR, WI
GREEN RIVER OP	DIXON, IL
RAMULUS AAP	RAMULUS, MI
DETROIT ARSENAL	WAARREN, MI
NIKE SITE 54-54	RIVERVIEW, MI
NIKE SITE 57-58	NEWPORT, MI
NIKE SITE 86	FRANKLIN, MI
NIKE SITE 97	PONTIAC, MI
GAP FILLER ANNEX	GRAND MARANS, MI
GAP FILLER ANNEX	ALPENA, MI

GAP FILLER ANNEX	SARRAGATUCK, MI
BURNSIDE GAP FILLER ANNEX	LA REER, MI
GAP FILLER ANNEX	MIDLAND, MI
GAP FILLER ANNEX	PETOSKEY, MI
GAP FILLER ANNEX	NORWAY, MI
GAP FILLER ANNEX	PAINESDALE, MI
GAP FILLER ANNEX	SHELBY, MI
FILRE GAP FILLER ANNEX	DRYBURG, MI
GAP FILLER ANNEX	ROSCONMON, MI
MUSKEGON ORD PLANT	MUSKEGON, MI
TRI CITY AAF	SAGINAW, MI
DETROIT ARTILLERY HOUSE	SOUTHFIELD, MI
USARC	INKSTER, MI
USARC	DETROIT, MI
USARC	LAVONIA, MI
USARC	JACKSON, MI
USARC	ANN ARBOR, MI
USARC	OAK PARK, MI
USARC	PONTIAC, MI
USARC	MARINE CITY, MI
USARC	BATTLE CREEK, MI
USARC	KALAMAZOO, MI
USARC	FRASER, MI
USARC	SAGINAW, MI
USARC	BAY CITY, MI
USARC	FLINT, MI
USARC	TRAVERSE CITY, MI
USARC	CHARLEVOIX, MI
USARC	MUSKEGON, MI
USARC	E. LANSING, MI
USARC	DANVILLE, MI
MCCHORD MIL AF	WA
MTN HOME MIL AF	ID
POCATELLO MIL AF	ID
REDMOND MIL AF	OR
FT ADAIR	OR

OLYMPIC NAT'L PARK	**PORT ANGELES, WA**
NAVAL OP	**POCATELLO, ID**
FT FORREST	**TN**
FREEMAN AAP	**SEYMOUR, IN**

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF DEFENSE AND THE ENVIRONMENTAL PROTECTION AGENCY FOR THE IMPLEMENTATION OF P.L. 96-510 THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (CERCLA)

1. PURPOSE

The Department of Defense (DOD) and the Environmental Protection Agency (EPA) are entering into this agreement to clarify each Agency's responsibilities and commitments for conducting and financing response actions authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and specifically delegated by Executive Order 12316.

This agreement does not redelegate any responsibilities set out in Executive Order 12316. Rather, it clarifies respective operational roles, responsibilities, and procedures, consistent with the applicable provisions of Executive Order 12316 and Executive Order 12088. This agreement does not create any substantive or procedural rights in other parties, does not affect enforcement rights and remedies with regard to any party, and is intended only for Federal administrative purposes of EPA and DOD.

These responsibilities and procedures are guided by the following:

- DOD facilities are defined as government-owned, government-operated facilities controlled by DOD; and government-owned land controlled by DOD that is either contractor-operated or leased to other parties.
- DOD is generally responsible for financing actions taken in response to releases from DOD facilities, or assuring that another party finances such actions.
- DOD and EPA will conduct response actions consistent with response procedures established by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).
- At DOD's request and in its discretion, EPA will provide DOD with technical assistance to support the response actions conducted by DOD.
- Civil works activities of the Department of Army Corps of Engineers are not subject to the terms of this agreement.

DOD will consult with EPA concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

2. BASIS OF AGREEMENT

CERCLA provides a comprehensive framework for response to the release or potential release of hazardous substances, pollutants, and contaminants.

Section 104 of CERCLA and Executive Order 12316 place authority for responding to releases from DOD facilities with the Secretary of Defense. These response actions must be conducted in accordance with the NCP as amended by EPA under section 105 of CERCLA.

3. RESPONSIBILITIES AND RESPONSE PROCEDURES

For purposes of this agreement, releases of hazardous substances are divided into three categories:

- Releases from current DOD facilities;
- Releases from former DOD facilities; and
- Other releases for which DOD is a responsible party.

For each category, section 3 describes procedures to be followed by DOD and EPA in determining which Agency will conduct and/or finance the response action consistent with CERCLA, the requirements of Executive Order 12316, and the NCP. At DOD's request and in its discretion, EPA will provide technical assistance or serve in an advisory role when DOD conducts a response.

3.1 Releases from Current DOD Facilities

a. Current DOD facilities with on-facility contamination and no off-facility contamination

When there is contamination on a current DOD facility and no off-facility contamination, DOD will conduct and finance the response action or assure that another party does so. At DOD's request, EPA will provide technical assistance or serve in an advisory role. This section does not apply to releases for which DOD is not a responsible party under section 107(b) of CERCLA (e.g., "midnight dumping").

b. Current DOD facilities with off-facility contamination

When there is off-facility contamination and clear evidence that a current DOD facility is the sole source, DOD will conduct and finance the response action or assure that another party does so. At DOD's request, EPA will provide technical assistance to DOD or serve in an advisory role.

When there is off-facility contamination and no clear evidence that a DOD facility is the sole source, EPA will finance and conduct investigations and studies off-facility to determine the source and extent of the contamination and recommended response action. DOD will finance and conduct investigations and studies on the DOD facility to determine the source and extent of the contamination and the recommended response action. DOD and EPA will coordinate these efforts and resulting decisions to minimize costs and duplication of activities, and will exchange all reports, studies, and other relevant site information.

If, after DOD and EPA review these investigations, it is determined that the current DOD facility is the sole source of the contamination, DOD will conduct and finance the response action or assure that another party does so and will reimburse EPA for costs EPA expended at the site.

If, after DOD and EPA review these investigations, it is determined that the current DOD facility is one of two or more sources of the contamination, EPA and DOD will jointly determine the most appropriate response and financing methods.

3.2 Releases From Former DOD Facilities

a. Releases from former DOD Facilities, when DOD is the sole responsible party

If EPA, in consultation with DOD, determines that a former DOD facility is the sole source of the contamination, DOD will finance any response action, including off-facility response actions, or will assure that another party does so. If EPA agrees, DOD may choose to conduct the response action. If EPA conducts the response action, DOD will reimburse the Hazardous Substance Response Trust Fund (Fund) for the action. EPA concurrence is required before DOD conducts a response action.

In cases where DOD disagrees with the determination of responsibility, proposed action, or its cost, DOD may use the dispute resolution section of this agreement.

B. Releases from former DOD facilities, when DOD is one of two or more responsible parties.

If EPA, in consultation with DOD, determines that DOD is one of two or more parties responsible for the contamination, EPA will conduct and finance the response action and EPA, in consultation with DOD, will determine the appropriate response costs. DOD will reimburse EPA that amount.

If EPA agrees, DOD may choose to conduct the response action. If EPA conducts the response action, DOD will reimburse the Fund for the action. EPA concurrence is required before DOD conducts a response action.

In cases where DOD disagrees with the determination of responsibility, proposed action, or its cost, DOD may use the dispute resolution section of this agreement.

3.3 Other Releases for Which DOD is a Responsible Party

When there is a release for which DOD is a responsible party, and which does not involve a current or former DOD facility, EPA will investigate the need for a response action, and the extent of responsibility of different parties for the release, including DOD's responsibility. EPA, in consultation with DOD, will determine the appropriate response costs and DOD will reimburse EPA that amount. If EPA agrees, DOD may choose to conduct the response action for the portion of the release for which it is responsible. EPA concurrence is required before DOD conducts a response action.

For releases from DOD vessels, including vessels owned or bareboat chartered and operated, DOD and EPA will jointly determine the most appropriate response.

In cases where DOD disagrees with the determination of responsibility, proposed action, or its cost, DOD may use the dispute resolution section of this agreement.

4. FUNDING OF RESPONSE

DOD will request sufficient funds in its budget to pay for response actions programmed by the Department under this agreement. DOD will ensure that projects in this budget program are listed in the same manner as other environmental projects under OMB Circular A-106.

When EPA undertakes a response for which DOD is responsible under CERCLA, DOD will reimburse the Fund for its share. Where funds are not immediately available for reimbursement, DOD's next fiscal year budget request will include a request for Fund reimbursement. Provisions of this agreement for payment by DOD shall not be construed as affecting the particular source of appropriations for payment by the government, including special appropriations or 31 U.S.C. 724a.

Any commitment of funds is subject to the availability of appropriations.

Each Agency will maintain records of all costs incurred which may involve payments to or from the Fund and will provide documentation of these costs at the other Agency's request.

5. COMMUNITY RELATIONS

When EPA undertakes a response action, EPA will be responsible for establishing a community relations program for the site, as specified in the Guidance for Implementing the Superfund Program (Part III, Section 4).

When DOD undertakes a response action, DOD will be responsible for providing information to the local community.

For EPA and DOD actions at the same site, EPA and DOD will conduct a joint community relations program.

6. EXCHANGE OF INFORMATION

DOD and EPA will exchange information on a regular basis. EPA and DOD will inform each other at the earliest possible stage of any evidence of contamination, types of contamination, and potential actions. EPA and DOD will keep each other informed regarding the type and availability of data or information. Such data or information will be made available upon request, subject to Agency technical or peer review. Upon request and following Agency technical or peer review, DOD and EPA will submit drafts of specific technical reports to each other for review. Review comments will be addressed in final reports.

Agency technical or peer review will be expedited when information is requested. All requests for data or information will be responded to within ten working days of the request.

EPA and DOD will notify each other prior to providing the other Agency's information or data to another party. All confidential business information exchanged under this agreement is subject to procedures set forth at 40 CFR Part 2.

This section applies to information related to all releases under section 3 of this agreement, including releases under section 3.1.

7. RESOLUTION OF INTERAGENCY CONFLICTS

Any conflict arising under this agreement will be resolved at successive levels of Agency decisionmaking until agreement is reached. The EPA Regional Administrator and the Commanding Officer of the Defense Component Major Command in question will first attempt to resolve any disputes. Failing resolution, the EPA Assistant Administrator for Solid Waste and Emergency Response and the appropriate Military Department Assistant Secretary will attempt to reach agreement. If this is unsuccessful, the matter will be referred to the EPA Administrator and the Secretary of Defense.

The dispute resolution process is not a substitute for necessary and timely removal actions, and each Agency reserves rights otherwise provided by law to pursue any response or enforcement actions.

8. MULTIPARTY AGREEMENTS

Where appropriate, EPA Regional Offices and DOD installations may enter into agreements with State and local authorities regarding response actions. Such agreements must be consistent with this agreement, except that dispute resolution sections of such agreements may supersede section 7 of this MOU.

9. AMENDMENTS

This agreement may be amended at any time by mutual agreement of EPA and DOD. Amendments will be in writing, and will be signed by appropriate DOD and EPA officials.

10. PERIOD OF AGREEMENT

Unless ended or extended by mutual agreement, this MOU will continue in effect until December 1, 1985. This agreement may be terminated upon notification by either DOD or EPA to the other party. A minimum of ninety days' advance written notice of termination is required.

11. EFFECTIVE DATE

This agreement will become effective upon signature of both parties.

LAWRENCE J. KORB
Assistant Secretary of Defense
(Manpower, Reserve Affairs and
Logistics)

Date: 8/12/83

LEE M. THOMAS
Assistant Administrator
Office of Solid Waste and Emergency
Response

Date: 8/12/83

The CHAIRMAN. Thank you. As I understand it, the Department of Defense is opposed to the citizen suits. Is that right?

Mr. SCHAFER. Yes, sir. We express our concern.

The CHAIRMAN. Mr. Thomas testified that these citizen suits could hamper the EPA in enforcement of this law. Do you agree with that?

Mr. SCHAFER. Yes, sir, I do.

The CHAIRMAN. The Defense Department feels the same way about it?

Mr. SCHAFER. Yes, sir.

The CHAIRMAN. I believe the Justice Department testified similarly, too.

Mr. SCHAFER. That is correct.

The CHAIRMAN. Is there any other suggestion about the law that you feel should be brought out?

Mr. SCHAFER. No, sir.

The CHAIRMAN. The Public Works Committee, you see, is bringing out this bill. Now, what changes should be made that you see other than citizen suits? Do you have any suggestions about anything else?

Mr. SCHAFER. With respect to the four sections of your particular interest?

The CHAIRMAN. Yes.

Mr. SCHAFER. I have no other suggestions, sir.

The CHAIRMAN. How is that?

Mr. SCHAFER. I am sorry?

The CHAIRMAN. I did not hear what you said.

Mr. SCHAFER. I am sorry. I have no other suggestions, sir.

The CHAIRMAN. All right. We may have several questions to submit to you, if so, could you answer those for the record?

Mr. SCHAFER. We will be happy to.

The CHAIRMAN. I want to thank you for your presence here and your testimony.

I think that concludes the hearing, unless there is somebody else now that wants to testify. We will continue this hearing and recess until Monday at 2. At that time, we will resume the hearing. We now stand adjourned.

[Whereupon, at 1:21 p. m., the committee was adjourned.]

SUPERFUND IMPROVEMENT ACT OF 1985—S. 51

MONDAY, JUNE 10, 1985

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:11 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Grassley, Specter, DeConcini, and Heflin.

Staff present: Diana Waterman, general counsel; Mike Wootten, counsel; Bruce Marks, legislative counsel to Senator Specter.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **Chairman**. The committee will come to order.

Today the Committee on the Judiciary will continue to hear testimony regarding specific aspects of S. 51, the Superfund Improvement Act of 1985.

Let me take this opportunity to reaffirm that the focus of our consideration is confined to those aspects of S. 51 having potential impact on our judicial system. Last Friday we heard from several witnesses. Due to the intense interest in this subject, a number of individuals and groups have requested an opportunity to be heard. We are pleased to make this opportunity available today.

I ask that each of you submit your full written testimony for the record and limit your comments to 5 minutes.

We will begin with the Honorable John B. Breaux, Congressman from Louisiana.

STATEMENT OF HON. JOHN B. BREAUX, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. **Breaux**. Thank you very much, Mr. Chairman, and members. I appreciate the opportunity to come over to your side and present testimony on this issue. I would like to try and focus in on just one aspect of the problem that we are all wrestling with, both on the House side and over here on the Senate side.

That problem relates to that portion of the legislation and the program dealing with the liability scheme for determining who is actually responsible for what portion of the cost of Superfund cleanups. I would submit my statement, Mr. Chairman, and try and summarize it for the benefit of the members.

On our side, we have discussed various elements of the Superfund Program—and the type of standards that we need to abide by, and also the liability scheme that is applicable to those who have contributed to the problem. I would like to focus in on how I think we can improve existing enforcement mechanisms in this legislation.

I think that the hearings that we have had, both in the House and the Senate, have shown that one of the reasons contributing to the slowness of the process of cleaning up the toxic dump sites around the country is the current liability scheme that we're trying to operate under.

I would point out that it is essential, I think, to place first things first. We should all bear in mind, I think, that the first priority of the Superfund legislation is to clean up toxic dump sites. It should not be converted, I think, into a fund for private party relief, nor should it be used as a giant liability net, designed first and foremost to punish contributors to the problem.

I think all of these items would only distract from the first priority, and that is the cleanup of the toxic dump sites.

I think it's unfortunate that as EPA proceeds with investigation and cleanup it also feels compelled to demand nearly 100 percent retribution from those it identifies as potentially responsible parties.

That's a fine objective. However, my understanding is that a few, or all of the parties must collaborate to come up with a total amount. In other words, individuals companies who would like to pay their fair share contribution to the problem, or undertake a portion of the work themselves, such as paying for performance of the remedial investigation and feasibility study, cannot do so because EPA demands nearly 100 percent reimbursement of all of the costs before it will settle for a portion with any of the parties.

There is an inherent notion that somehow the responsible parties are in a better position to sort our their shares of the total damage among themselves than dealing directly with our Government.

The question I raise is why should an individual potentially responsible party have any special knowledge about any involvement by any other company. I think any company that is listed as a potential defendant knows what their involvement is, knows how much they've contributed to the problem, and they should be encouraged to come up and prove what they are responsible for and take action necessary to clean up the site.

I doubt very seriously whether company A is going to know very much about company B or company C or any other company down the line as far as how much they should be held responsible for.

Let me state very strongly that what I am describing is a serious problem, but it does not involve the standard of liability. I think the standard of liability that has been applied by the courts should maintained in the appropriate circumstance, that being strict, joint and several.

I am familiar with the concept of joint and several liability as it has been applied under section 311 of the Clean Water Act, and this should not be changed.

What I am supporting, and recommending to this committee is to support, is a method to streamline the administrative system to encourage a more effective and fair negotiation, to avoid the countless and counterproductive law suits that we are now seeing.

Simply put, I think the system is broken; it needs fixing. It's not working the way it's being carried out by the Agency at this time. I think the Agency should concentrate first on cleaning up the toxic dump sites. That should be the first priority, and this can be accomplished through the encouragement of voluntary cleanups wherever possible.

I think EPA is too often treating the liability standard of joint and several liability as the reason that it cannot expedite negotiations.

I would emphasize that this is not some visceral feeling on my part, but rather one supported by an objective and thorough analysis of the EPA's enforcement policy. I think the committee is familiar with the findings of environmental law Prof. Federick Anderson for the Administrative Conference of the United States last year.

He studied the negotiation processes that EPA was working under, and noted that while the courts have interpreted the bill to impose joint and several liability for cost reimbursement, the courts have plainly reserved the right to require EPA to apportion costs in circumstances where individual waste contributions can be identified.

However, my concern is that EPA is simply not doing that. An example of the current attitude of EPA is, I think, clearly shown in the enforcement action at the Midco site at Gary, IN. There were actually two waste sites at Midco, one of which had already been cleaned up.

A group of generators representing about 60 percent of the volume of the waste allegedly sent to the two sites offered to clean up the second site and reimburse EPA for half of the costs incurred in the cleanup of the first site and take additional action representing 85 percent of the estimated costs and remedial actions required.

What happend? Well, the Justice Department, on behalf of EPA, rejected this offer, and then went out and sued only 9 of the 121 generators for the total cleanup costs. The Government alleges that these nine companies are strictly, jointly and severally liable for reimbursing all of the Government costs.

Among the nine generator defendants are those companies that led the effort to undertake a voluntary site cleanup and cost reimbursement plan.

What I am saying, Mr. Chairman, is that we ought to have an operational procedure that encourages companies to come in and say, look, we're responsible for 10, 20, 30 percent. Here are our records. Let me show you what we've done at this site and agree to pay for those amounts, and then have them contribute to the amount to clean up the 30 or 40 percent or whatever they had.

That would encourage companies knowing that they could come up and not be held responsible for the 100 percent if they can show that they are only responsible for 30 percent.

EPA would not need to change the underlying liability standard. The standard would still be joint and several. If none of the companies come forth, they could go after any of the companies and proceed against them.

However, I think the way it's being handled now is simply not working, and I think the testimony of learned professors who have studied the problem agree with me, and that is contained in this testimony.

So, what I am suggesting, Mr. Chairman, is that we consider amending the statute to require EPA to establish a procedure which would allow the Government to apportion responsibility for those parties whose contribution to the hazardous situation is completely and fully documented, either through EPA's investigation or by information presented by the potentially responsible party itself.

In fact, it has already been suggested before another committee that an administrative procedure type of mechanism be established. A special master could be appointed that would take testimony from the companies, and they could establish that each company was responsible for a certain percentage and hold them liable for it.

Of course, criteria should be provided to assist in the determination of proportional liability. A similar procedure was presented in the House during the original Superfund authorization in 1980 by Senator Gore, then Congressman Gore. I think it has a great deal of merit, and that's what I am recommending.

If you have a responsible party who does not choose to participate in the procedure, you still have the hammer that you could hold over them by holding them jointly and severally responsible for the total amount.

The last point I would simply make is that companies in some cases are spending more money litigating between themselves who is responsible for what percentage than we are spending in cleaning up the sites.

And that, I think, is not the way it should be handled. It brings about a large number of delays, and I think, Mr. Chairman, your committee could go a long way to ensuring that our cleanup efforts are more expeditiously being carried out.

I thank the chairman and the members.

[The statement and a letter of Mr. Breaux follow:]

PREPARED STATEMENT OF HONORABLE JOHN B. BREAUX BEFORE THE SENATE COMMITTEE ON JUDICIARY IN REGARD TO S. 51 (SUPERFUND)

JUNE 10, 1985

Mr. Chairman, I am pleased to testify before your Committee today concerning liability and settlement under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). I believe it is essential to examine how that scheme is working as the Congress proceeds with reauthorization of this important program. By way of background, you should know that I have voted twice for Superfund, once for the original legislation in 1980, and again last year when the House passed H.R. 5640, which would have reauthorized the law at a far greater funded amount than its present level.

Prior to its enactment in 1980 and again for the past two years, the Public Works and Transportation Committee, on which I serve, has held numerous hearings on the Superfund legislation.

We have conferred and discussed key elements of the Superfund program such as its proper scope, the type of cleanup standards that will ensure public safety and health, and the liability scheme applicable to those who have contributed to problem sites. As more sites are discovered and placed on the National Priority List, I believe the Congress must improve the enforcement mechanism so that the Environmental Protection Agency (EPA) can clean up as many of them as possible in the most expedient manner, and without unnecessary delay due to an overemphasis on total recoupment. Through the many Congressional hearings on the subject in the past two years, it has become increasingly evident that part of the slowness of Superfund cleanup is attributable to the complex nature of the cases and the current liability scheme.

I am sure that we agree that no single domestic policy issue is so critical to the eventual quality of life in the U.S. as the Superfund law. Without an efficient system in place, more of the nation's groundwater will be threatened. Groundwater is a resource which is sacred to the welfare of the Country.

EPA has been maligned from all corners for only completing cleanup at a handful of sites thus far. This is perhaps unfair to the Agency, because Superfund cases involve a myriad of complex investigatory, technical and legal problems. There is a lead-time attendant to cleanup at a site which means that hundreds and perhaps thousands of sites could be in the pipeline of cleanup before total resolution at any fixed time. Congress should want the job done expeditiously, however, regardless of the natural time constraints.

It is essential, therefore, to place first things first. We should all bear in mind the fact that Superfund is first and foremost an administrative environmental protection law. It should not be converted into a fund for private party relief, nor to be used as a giant liability net designed first and foremost to punish contributors to the problem. This will only distract the emphasis from cleanup--its first priority.

Unfortunately, as EPA proceeds with investigation and cleanup plans at a site, it also feels compelled to demand 100 percent retribution from those it identifies as Potentially Responsible Parties (PRPs). This is a fine objective. However, my understanding is that a few or all parties must collaborate to come up with the total amount. In other words, individual companies who would like to pay their fair-share contribution to the problem or undertake a portion of the work themselves, such as paying for performance of the Remedial Investigation and Feasibility Study, cannot do so because EPA demands nearly 100 percent reimbursement of all costs before it will settle for a portion with any parties. There is an inherent notion that somehow the responsible parties are in a better position to sort out their shares of the total damages among themselves than directly with the government. This strikes me as unnatural.

Why should an individual potentially responsible party have any special knowledge of the involvement of the other PRPs? Indeed, EPA's policy under the law could lead to situations whereby large companies with enough resources will attempt to dictate unfair settlement terms to smaller companies at a site. These smaller companies may be willing to pay their fair share to the Fund and even a surcharge to avoid transaction costs if they just had the chance. But now they face two threats, unrealistic allocation of shares by their fellow PRPs and a lawsuit by the government if they do not agree to participate in a settlement under those terms.

Let me state that what I am describing as a serious problem does not involve the standard of liability, which should remain strict, joint and several as applied by the courts in a given circumstance. I am very familiar with the application of joint and several liability as it has evolved under Section 311 of the Clean Water Act. Section 311 of the Clean Water Act is the reference point for application of Superfund liability in the current law. This should not be changed because it serves as a valuable impetus for PRPs to engage in serious negotiation towards the goal of settling for cleanup costs or performance.

I do, however, support a streamlined administrative system to encourage a more effective and fair negotiation to avoid countless, counter-productive lawsuits. For those who would be recalcitrant, once given a fair opportunity to settle for their demonstrated contribution to the problem, let the axe of joint and several liability fall swiftly.

Simply put, the current enforcement policy at EPA is broken. The Congress is obligated to fix it so that the Agency may concentrate on cleanup first, and encourage voluntary cleanup wherever possible. EPA too often treats the liability standard of joint and several as the reason that it cannot expedite negotiations for cleanup of an abandoned waste site.

I would emphasize that this is not some visceral feeling on my part, but rather, one supported by an objective and thorough analysis of EPA's enforcement policy. I am certain that this Committee is familiar with the findings of environmental law professor Frederick R. Anderson for the Administrative Conference of the United States last year. In his study of negotiation and agency action, Professor Anderson noted that while the district courts have interpreted CERCLA Section 107 to impose joint and several liability for cost reimbursement, they have plainly reserved the right to require EPA to apportion costs in circumstances where individual waste contributions can be identified. Professor Anderson asserts that the importance of the application of this special statutory version of the common law doctrine of joint and several liability lies in the flexibility it permits the courts in resolving the complicated issue of how the costs of cleanup are to be apportioned. I quote "And the consequence to EPA is less certainty that it can effortlessly collect total cleanup cost and walk away from the demanding task of cost allocation." (Report, p. 45). In my view, the Agency is therefore on firmer legal ground when its first attempts to apportion damages. Yet the Agency acts contrary to this position.

An example of the current attitude by the government is the enforcement action at the Midco site in Gary, Indiana. There were actually two waste recycling sites at Midco, one of which has already been cleaned up. A group of generators, representing approximately 60 percent of the volume of waste allegedly sent to the two sites, offered to clean up the second site, reimburse EPA for half of the cost incurred in the cleanup of the first site and take additional action representing 85 percent of the estimated costs and remedial actions required.

The Justice Department, on behalf of EPA, rejected this offer and sued only 9 of the 121 generators for the total cleanup costs. The government alleges that these nine companies are strictly, jointly and severally liable for reimbursing all government costs. The government alleges that these nine companies are strictly, jointly and severally liable for reimbursing all government costs and, through injunctive relief, to carry out all necessary remedial activities for any surface and sub-surface contamination. Among the nine generator defendants are those companies that led the effort to undertake a voluntary site cleanup and cost reimbursement plan.

It is clear that the refusal to negotiate based on fair-share contribution in the Midco enforcement action did not serve as an impetus for achieving a voluntary expedited response to cleanup.

On February 5, 1985, EPA published in the Federal Register its interim CERCLA settlement policy. The Agency boldly asserts that its "settlement policies have resulted in numerous comprehensive private party cleanups--and in stronger settlements with private parties." And yet, numerous sites placed on the priority list years ago, including Seymour, Stringfellow, Midco, Envirochem and the Valley of the Drums, have not been completely cleaned up and full remedial action implemented.

As early as June 1983, the EPA was being told that its approach would only foster delay. In the panel discussions reprinted in the June issue of Environmental Forum, William Eichbaum, Assistant Secretary for Environmental Programs in Maryland, questioned EPA officials participating in the discussion, asking "But isn't one of the real fundamental issues whether we decouple the cleanup from the liability question? Because it seems to me that as long as the two are tied and there's a financial stake, the process is going to work very, very slowly. It seems to me that the public interest is first cleanup, particularly for historical sites, and second, liability for something which you were not liable for when you did it."

I agree with Mr. Eichbaum and with Professor Anderson who suggests that "A growing body of opinion inside and outside EPA favors developing the negotiation alterntative. It promises gains in promptness and efficiency, because it vests cleanup responsibility in those who ultimately will bear the cleanup costs. Negotiation promises to tap whatever technical superiority and comparative frugality the private sector can offer. Negotiation should reduce large transaction costs associated with the Fund and litigation alternatives." (Report, p. 47).

I do not believe that we should ignore this view in favor of maintaining the status quo. If I may, I would like to highlight some alarming points and figures presented in the testimony of Mr. John C. Butler III, Director of the firm of Putnam, Hays and Bartlett before the Senate Environment and Public Works Committee on April 3 of this year. Mr. Butler describes the high transaction costs parties incur because the government's policy under the present law does not encourage settlement at multi-party sites.

He believes that because government policy prevents settlement by PRPs, unless they are willing to contribute a substantial portion approaching 100 percent of the remedial costs, small contributors who are willing to contribute their proportionate share are unable to settle. To compound matters, the government's refusal to grant releases limiting liability for additional payment in the future discourages settlement since parties are not usually willing to accept open-ended liability.

Suing only a few PRPs will then almost certainly result in the need to join other parties with claims being asserted by all parties against each other. This has happened, for example, in the Conservation Chemical Company case. This case intially involved four parties. The original defendants cross-claimed against more than 250 parties and insurance firms, thus causing litigation costs that may exceed the cleanup cost by a factor of two. One defendant projected pre-litigation costs to be $5 - $12 million, with litigation costs for the Phase I portion of the trial to be $7 to $16 million. Total private party litigation cost for the trial could be more than $30 million. The government's litigation cost to date has exceeded $2 million. These amounts greatly exceed the cost of cleanup which may range from $10 - $18 million. While filing a case against a few PRPs might be good government strategy for "winning" the case, since it divides the PRPs and is more convenient, it may conflict with society's objective to remove the site hazard at the least total cost.

Mr. Butler's firm has also projected the eventual costs and inefficiencies associated with an inflexible non-incentive settlement policy.

The analysis begins by assuming that 1800 sites will be named to the National Priorities List. The average cleanup cost per site is $8.1 million for a total of $14.6 billion in total cleanup cost. The litigation costs include projections of private party litigation costs, government legal and enforcement costs and insurance company costs. If litigation costs continue at present levels, total litigation costs could exceed $8 billion, or 55 percent of direct cleanup costs.

In light of these astounding projections and the current enforcement morass, I endorse the recommendations of the U.S. Administrative Conference. Specifically, while the Conference believes that we must maintain EPA's strong litigation posture in Superfund cases, in order to strengthen its ability to negotiate agreements in the public interest, it also believes that the Agency must be instructed to negotiate, even if a substantial portion of cleanup costs has not been offered and to agree with parties about the amounts of their individual responsibilities to pay cleanup costs even if the total responsibility so negotiated adds up to less than 100 percent of cleanup costs. The Fund should pay for the rest and either pick up the true orphan share or pursue non-settling parties under cost recovery. The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsibility nor to thwart the commencement of clean-up activities at Superfund sites. Moreover, such partial agreements may free Agency resources to pursue the intransigent parties."

The Conference acknowledges that the effectiveness of expanded reliance on negotiated cleanups would depend upon the degree of support or opposition from relevant Congressional committees. I therefore urge this committee to support and encourage amendments to S. 51 which would facilitate negotiated solutions.

The EPA already has the statutory authority to obtain the necessary information to apportion liability for use at a given hazardous waste site. CERCLA Section 104(b) authorizes EPA to investigate instances of actual or threatened releases of hazardous substances. The Agency can obtain the disposal records of the site owner and operator and all transporters and generators either by agreement or by issuing an Administrative Order pursuant to their authority under Section 106(a). Under Section 103(e) generators are required to notify EPA of past sites to which they had shipped their hazardous waste for disposal specifying the amounts and types of waste disposed. Hazardous waste transporters and waste site operators are to compile similar reports under Section 103(c).

To encourage potential responsible parties to voluntarily provide the necessary information to apportion liability, Superfund should be amended. EPA should be required to establish a procedure which would allow the government to apportion responsibility for those parties whose contribution to the hazardous situation is fully documented either through EPA's investigation or by information presented by the potentially responsible party itself. In fact, an administrative claims procedure was suggested in testimony before the Senate Committee on Environment and Public Works during hearings on the reauthorization of Superfund. It was recommended that a notified potentially responsible party be given a specified amount of time in which to gather and present all relevant records and other pertinent information regarding his contributions to the hazardous waste problem at a given site. The information, it was suggested, could be received and evaluated either by EPA or through the appointment of a Special Master. Based on this information, a determination of a potentially responsible party's fair-share contribution to the costs of cleanup and remedial action could be made.

I believe that the appointment of a Special Master to determine apportionment of liability has merit. This concept would not unduly burden the resources of EPA, which can be better devoted to cleanup activities. Moreover, it avoids the potential problem of misuse of administrative discretion. A procedure could be established whereby any potentially responsible party who wishes to participate in the Special Master proceeding could do so. Each participant would be bound by any apportionment judgement that resulted from the proceedings. That Special Master should be granted subpoena power, to ensure all information relevant to the apportionment determination is made available. Strict time frames for the production of necessary information and a final determination by the Special Master should be established to avoid unnecessary delay.

The Special Master or the Administrator could use criteria similar to that which was contained in the "Gore Amendment," offered on the Floor of the House in 1979 to H.R. 7020 by then Congressman Gore, to determine each participant's share of responsibility for cleanup costs and remedial measures. For example:

(1) The amount of hazardous waste shipped or transported to the site by the participant and the percentage that waste comprises of the total volume of waste sent to the site;

(2) The amount of hazardous waste present at the site which can be attributed to the participant and the percentage of the total it represents;

(3) The degree of hazard to health and the environment associated with the hazardous waste attributed to the participant;

(4) The cost of conducting response or remedial actions for the participant's portion of the hazardous waste at the site; and

(5) The participant's culpability or degree of control over conditions at the site.

Those potentially responsible parties who choose not to participate in the proceeding or who are unable to clearly demonstrate their contribution to the site could be held jointly and severally liable for any remaining cleanup costs and remedial actions not covered by the decision of the Special Master or Administrator. This would protect against those potentially responsible parties who choose to "hide in the weeds" rather than come forward and contribute their fair share.

This procedure would provide an incentive for voluntary contribution to cleanup while preserving the power of EPA, through joint and several liability, to enforce complete cleanup or recovery of the costs of cleanup to the maximum extent possible.

In summary, the scope of liability under Superfund is now in a state of turmoil. While EPA, the Justice Department and industry defendants wage battle in U.S. district courts over the meaning of Superfund's liability provisions, numerous hazardous waste sites continue to pose a threat to human health and the environment.

A more flexible enforcement approach, by providing an opportunity for potentially responsible parties to prove their fair-share contribution and repay only that fair share, would promote more rapid resolution of the problem presented by these hazardous waste sites.

An apportionment approach is consistent with the intent of Congress as evidenced by the legislative history of Superfund. In fact, as recently as March, 1984, Congressman Florio, in response to the testimony of a witness before his Subcommittee reiterated his understanding of the intent of Congress to provide for apportionment, when he stated:

> ...at least I saw the intent of the Congress--to provide for the ability of a defendant under joint and several liability to come in and get an apportionment if, in fact, it could be demonstrated to the court's satisfaction and by inference to EPA's satisfaction that there was an ability to quantify the amount of the contribution to the overall problem.

I agree with Mr. Florio. The role of both the Agency and the courts should not be that of punitive masters. Their proper role is to compel such reimbursement and issue such equitable relief as best ensures that Superfund achieve its primary goal: the best cleanup of the largest number of sites in the shortest possible time at the lowest cost.

NINETY-NINTH CONGRESS

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U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
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CHIEF COUNSEL
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MINORITY STAFF DIRECTOR
GEORGE D. PENCE

June 17, 1985

Honorable Strom Thurmond
Chairman
Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

This is to thank you for providing me with the opportunity to testify before your committee on S. 51, the "Superfund Improvement Act of 1985." As mentioned in my testimony, I am extremely concerned about the torturous path that settlements with EPA must undergo to resolve Superfund site cases and to effect prompt clean-ups.

Although EPA has published proposed new settlement procedures, they are inadequate to address the essential problem, which is the unavailability of an administrative forum in which potentially responsible parties can provide evidence as to their contribution to a site in a timely manner and in effect, "cash out" by paying their fair share. Relying on settlements in which a multitude of responsible parties must agree among themselves and make an offer to EPA simply has not and will not work effectively or efficiently. This procedure greatly increases transactional costs and delays cleanups.

Recently announced settlements by EPA make this point vividly. Although it is understandable that EPA is reluctant to assume the role of apportioning liability, this may be the only effective way to eliminate the enormous transactional costs now incurred. One major step in assisting EPA in making such determinations would be to provide statutory criteria for assessing fair share (for example volume, toxicity, control of the site, etc.). The alternative to an efficient settlement process is to force the judicial system into assessing liabilty to those sued by EPA as the "deep pockets" at a given site under the theory of strict, joint and several liability and then require these parties to seek contribution from other potentially responsible parties in a proliferation of separate lawsuits.

We have been looking at two separate approaches to resolving the apportionment problem. One would put the determination of liability in the hands of a special master appointed by a U.S. district Court Judge, and the other would leave the apportionment determination at the administrative level with EPA. I have enclosed materials related to both for your consideration. You will note that both approaches provide criteria for determining liability, and neither affects the strict, joint and several standard now applied by the courts where a determination cannot be made.

Another issue addressed before your Committee which concerns me greatly is the imposition of liability without limit or fault on remedial action contractors despite the exercise of due care in performance of a Superfund cleanup contract. Adequate insurance coverage is also in doubt. Failure to address this problem adequately in the statute may have the effect of discouraging those best able to manage and perform cleanup actions from bidding for contracts. The resulting delays or inadequately performed work will certainly lead to even more litigation making Superfund a greater "lawyers relief act" than it already is.

I think it would be very useful if you and your colleagues were to consider these matters and express your concerns even though I recognize that because of time constraints your committee might not be able to directly address this at this time.

Again, I appreciate the opportunity to present these concerns to your committee and look forward to working with you and your staff on this important matter.

Sincerely,

John Breaux

JOHN B. BREAUX
Chairman
Subcommittee on Fisheries
and Wildlife Conservation
and the Environment

JBB/tsgf

Apportionment of Superfund Liability

Administrative Approach

AUTHORITIES AND PROCEDURES FOR EXPEDITED JUDICIAL RESOLUTION OF RESPONSIBILITY

Sec. 202. (b) Section 107 is amended by adding at the end thereof the following new subsection:

Settlement Process

(1.) (1) The Administrator shall endeavor to settle claims for relief under section 106 (except administrative orders, issued under section 106(a)) and for costs and damages arising under subsection (a) of this section, prior to referring the case to the Attorney General for further action. Settlements shall be made with each or any potentially responsible party(s) ("party") pursuant to this subsection and any regulations promulgated thereunder and shall, wherever reasonable, apportion the responsibility of each responsible party in accordance with its fair-share contribution to the remedial costs or natural resources damages.

(2) A settlement under this subsection shall be final and conclusive as to the matters addressed in the settlement unless achieved through fraud, misrepresentation, or other misconduct by one of the parties to the settlement. No court shall have jurisdiction to review the settlement unless there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct.

(3) (A) Within 180 days of the effective date of this Act, the Administrator shall promulgate regulations prescribing procedures applicable to the settlement process and establishing a basis for apportionment, including, but not limited to:

(i) the amount of hazardous waste shipped or transported to the site by the party and the percentage that waste comprises of the total volume of waste sent to the site;

(ii) the amount of hazardous waste present at the site that can separately be attributed to the party and the percentage that waste comprises of the total volume of waste present at the site;

(iii) the degree of health and environmental hazard associated with the hazardous substances attributable to the party, where relevant to the necessity for, or magnitude of, cleanup costs or the magnitude of natural resources damage;

(iv) the cost of carrying out remedial actions under this Act for the portion of the hazardous substances (s) attributable to the party; and

(v) the degree of cooperation of the party with federal, state or local officials to prevent harm to health or the environment.

(vi) any other reasonable basis for apportioning the responsibility of the party, including, where appropriate, the length of time the party owned or controlled the site.

(B) The burden is upon the party to demonstrate its fair-share contribution to the remedial costs or natural resources damages under this section according to the basis for apportionment established in subsection (3) (A). If a party can so establish its contribution, its responsibility shall specifically be limited and bound to that portion of the costs or damages and so specified in any settlement agreement signed by that party and the government.

(4) No party shall be liable for remedial costs or natural resources damages that are attributable to other responsible parties, any parties shown to be liable but insolvent, or to a hazardous substance generated by a party that cannot be identified. In those cases where the party is insolvent or cannot be identified, the Fund shall cover the portion of costs or damages attributable to such parties.

(m) (1) For any party that does not, or cannot satisfy the burden to settle with the government for his fair-share contribution as set forth under subsection (1), the Administrator shall refer that claim to the Attorney General for further action.

(2) The court shall exercise its equitable powers to the maximum extent practicable in determining the remedy under this subsection. The court shall allocate equitable shares for the hazardous substances attributable to any parties shown to be liable but which are insolvent, judgment-proof or which cannot be identified, and shall direct that such shares be drawn from the Fund pursuant to section 111(a).

(3) All nonsettling parties that may be liable under this section may be joined by existing defendants as co-defendants.

(4) The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subsection (a). Such interest shall accrue from the date on which the United States files an action for recovery of such amounts or the date expenditures are actually incurred, whichever comes later. The rate of interest on the outstanding unpaid balance of the amounts recoverable shall be the same rate as is applicable to investments of the Fund under section 223(b) of this Act. For purposes of applying section 223(b) in the case of interest on amounts recoverable, the term "comparable maturity" shall be determined with reference to the date of filing of the action for recovery under this section."

(c) Section 107(d) is amended by striking out "damages" in each place it appears and inserting in lieu thereof reasonable "costs or damages".

Apportionment of Superfund Liability
Special Master Approach

Section -- Right to Seek Declaratory Judgment Through a Special Master Proceeding to Determine the Extent of Responsibility for Costs and Damages.

(a) Notice -- Within 30 days after receipt of notice as a potentially responsible party pursuant to Section 104 of the Act, any potentially responsible party may file a request in the U.S. District Court where the site or facility identified in the notification is located for a declaratory judgment of his portion of the responsibility for costs and damages under this Act. EPA's notification of parties of their potential responsibility under this Act shall include notice of the rights specified in this section.

(b) Appointment of a Special Master -- Following a request for a determination under subsection (a), the U.S. District Court shall appoint a Special Master to review relevant information and to recommend for each potentially responsible party who files a timely request, an apportionment of individual responsibility for cleanup costs and natural resources damages under this Act.

(c) Duties and Powers of the Special Master --

(1) The Special Master shall promptly publish in the Federal Register and in a daily newspaper in the city in which the District Court is located a notice (i) containing the notification letter issued under section 104 to potentially responsible parties, (ii) informing the public of the request for an apportionment determination under this section, (iii) inviting any person who may be a potentially responsible party under this Act to participate in the proceeding by filing a request

to do so with the Special Master within 60 days, and (iv) providing notice that each person who participates in the proceeding is bound by any apportionment judgment that results from the proceeding. The U.S. EPA, the state in which the site is located and each potentially responsible party who files a timely request shall be a "Participant" in the proceeding as a matter of right.

(2) The Special Master may subpoena or otherwise require the production and disclosure by all Participants in a proceeding under this section, all other potentially responsible parties, and others who have relevant knowledge and information, of all information relevant to the issues in such proceeding; including but not limited to lists of potentially responsible parties, transporter and facility owner/operator records, invoices, dray tickets, bills of lading and other shipping records, contracts and other documents indicating quantity, type and nature of wastes involved and dates of shipment, waste sampling, soil sampling, ground water monitoring results, contractor's reports, remedial investigation and feasibility studies, government response and remedial costs incurred and anticipated under the National Contingency Plan, and any other information relevant to apportioning responsibility in such proceeding. The knowing submission of false information to the Special Master shall constitute a misdemeanor punishable by imprisonment of up to 6 months and a fine of $25,000, or both.

(3) The Special Master may establish procedures applicable to proceedings under this section as may be appropriate, and may appoint expert assistance for the purpose of evaluating information produced

or submitted pursuant to subsection (c)(1) and assisting the Special Master make a determination of the share of responsibility of each Participant.

(4) The Special Master shall make a final recommendation to the Court of each Participant's share of responsibility for the costs and damages no later than one year after his appointment, except as provided in subsection (5) hereafter.

(5) If remedial investigation and feasibility study approved by the Administrator has not been completed and said study would provide information necessary for the Special Master's decision hereunder, the Special Master may extend the one-year deadline in order to gather such necessary additional information.

(d) Basis of Special Master's apportionment recommendation -- The Special Master's recommendation shall contain a determination of each Participant's portion of the cleanup costs and natural resources damages and shall, without limitation, be based on the following criteria:

(1) the amount of hazardous waste shipped or transported to the site by the Participant and the percentage that waste comprises of the total volume of waste sent to the site;

(2) the amount of hazardous waste present at the site that can separately be attributed to the Participant and the percentage that waste comprises of the total volume of waste present at the site;

(3) the degree of hazard to health and the environment associated with the hazardous substance(s) which are attributable to the Participant, where relevant to the necessity for or magnitude of cleanup costs or the magnitude of natural resources damage;

(4) the cost of carrying out response or remedial actions under this Act for those portions of the hazardous substance(s) attributable to the Participant.

(5) any other reasonable basis for apportioning the responsibility of the Participant, including the Participant's culpability or degree of control over conditions at the site.

(e) Recommendation to the Court --

(1) The Special Master's recommendation to the Court as to each Participant shall be in the form of a recommended amount certain or a percentage of the total actual and anticipated response and remedial costs and natural resources damages, or a combination of these measures -- offset by an appropriate credit for any voluntary response or remedial action undertaken or agreed to by the Participant. The apportionment formula or plan adopted by the Special Master may not apportion to any Participant responsibility for the portion or share of cleanup costs or natural resources damages of any non-Participant.

(2) Where no reasonable basis exists for apportioning a Participant's share of cleanup costs or natural resources damage, the recommendation of the Special Master to the Court shall so state and no declaratory judgment hereunder shall be entered by the Court as to that Participant.

(f) Final Determination and Payment -- Judgment and Decree Unless the Special Master's apportionment recommendation is clearly arbitrary or erroneous, the Court shall issue a declaratory judgment fixing the share of the Participant's responsibility for remedial and response costs and natural resources damages as contained in the Special Master's recommendation, and, where appropriate, requiring payment of any portion of said amount into an escrow fund and/or the posting of an adequate bond until total response and remedial costs have been determined.

(g) Effect of Judgment and Decree

(1) Under this act the declaratory judgment of the Court under this section shall be final and binding. It shall not be subject to review or offensive or defensive collateral attack as to the Participant's share of responsibility for response or remedial costs or natural resources damage. Nothing contained herein shall impair any Participant's right to contest in any subsequent proceeding the lawfulness of government response or remedial costs or impair any Participant's right to contribution or indemnity against a non-participant.

(2) Payment by a Participant of the judgment entered hereunder shall be made within 60 days and shall preclude all rights of action against the Participant for equitable relief or reimbursement of response and remedial measures and costs and damages. Timely payment of the judgment shall bar and preclude all rights of contribution or indemnity under this Act or any other law against said Participant for response or remedial costs or damages incurred under the Act at the site or facility.

(3) Nothing contained herein shall impair the rights of EPA, of a State, or any other Participant under this Act to equitable relief or cost reimbursement from any person not a Participant to the proceeding for declaratory judgment.

(4) If the Court does not enter a declaratory judgment apportioning the Participant's responsibility (i) the Participant is not bound by any Recommendation or any finding of the Special Master or of the Court; (ii) no finding of fact or law, Recommen-

dation or decision resulting from this proceeding shall be admissible against the Participant in any other proceeding; and (iii) participation in this proceeding shall not constitute an admission of liability or wrongdoing or evidence on any issue of fact or law in any proceeding under this Act or any other law.

(5) Except in a proceeding to execute a declaratory judgment hereunder, if a declaratory judgment is entered apportioning Participant's responsibility (i) no finding of fact or law, recommendation or decision resulting from this proceeding shall be admissible as evidence against the Participant in any other proceeding; and (ii) participation in this proceeding shall not constitute an admission of liability or wrongdoing or evidence on any issue of fact or law in any other proceeding under this Act or any other law.

(g) Moratorium during Special Master Proceeding -- During the proceeding hereunder no action may be brought by any person against a Participant under this Act or under any other authority of Federal or State law for equitable relief to abate a release or threatened release of hazardous substance at the site or facility or for reimbursement of any response or remedial costs or natural resources damages.

RESPONSE ACTION CONTRACTOR LIABILITY

SUMMARY

This new subsection defines the liability of contractors engaged in cleanup activities who are not otherwise "responsible parties" pursuant to subsection 107 (a). Under the new subsection, liability attaches to the response action contractor only in the event of the contractor's negligence and is subject to a monetary limit. The new subsection also places a time limitation on actions against such contractors and specifically requires the Administrator to review and approve remedial and response action plans.

DISCUSSION

Competent contractors should not be discouraged from assisting in remedial and response action efforts by virtue of the potential for being held jointly and severally liable, even in the absence of fault, for personal injury or property damage arising out of releases of hazardous substances during or after these activities. This new subsection establishes a national standard of liability for response action contractors based solely on their negligence.

Similarly, the magnitude of the potential claims and the inability of remedial contractors to assess the risk thereof in advance of accepting remedial or response action tasks, together with the length of time which the contractor would be exposed, creates disincentives to contractor participation and worsens the present extreme difficulty in obtaining insurance to cover such claims. The new subsection provides a limit of liability in the event of contractor negligence and a limitation of actions, both of which are intended to make the risk more manageable for the contractor and encourage participation by the insurance industry.

The new subsection does not affect the liability of or time for bringing actions against persons who are defined as "responsible parties" under subsection 107 (a).

Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 is amended by adding the following new subsection at the end thereof:

"(j)(1) Notwithstanding the provisions of Section 114 of this Act, any person, including the officers, agents, employees and subcontractors of such person, (hereinafter in this subsection collectively referred to as the 'response action contractor') who enters into a contract, subcontract or agreement (hereinafter in this subsection referred to as the 'response action contract') with the Administrator or his delegee, a State, or any other person to provide any technical assistance, initial or remedial site investigation, feasibility study, evaluation, planning, engineering, design, construction, construction management, equipment, repair, maintenance, modification, treatment, removal or any ancillary services (hereinafter in this subsection referred to as 'response action services') shall not be liable under any federal law or the law of any State or political subdivision or common law to any person for any injuries, costs, damages, expenses or other liability, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury or loss of or damage to property, which result from a release or threatened release of a hazardous substance, pollutant or contaminant, except for bodily injury or loss of or damage to property caused by the negligence of such response action contractor as determined by the relevant industry standards at the time of the response action contractor's conduct. Where the response action contractor is acting pursuant to the National Contingency Plan or a remedial or response action plan approved by the Administrator, or his delegee, or a state, the total, aggregate liability of a response action contractor arising out of or in connection with activities under a response action contract or with respect to activities under several response action contracts relating to any facility or vessel shall not exceed the lesser of (a) Five Million Dollars ($5,000,000), or (b) twice the total amount of compensation received by the response action contractor (excluding amounts paid to subcontractors or consultants by said response action contractor) pursuant to the response action contract under which the activities out of which the liability arises were conducted. No suit against a response action contractor shall be commenced after the expiration of five years after the completion or termination of the response action contract.

(2) The Administrator, or his delegee, shall provide for the review and approval of remedial and response action plans regardless of whether such plans concern sites on the National Priority List.

(3) Nothing in this subsection shall provide any exemption from liability for any person other than the response action contractor. No person shall be deemed to be a responsible party under paragraph (1), (2), (3), or (4) of Section 107(a) of this Act by virtue of performance of response action services. Nothing in this subsection shall exempt any response action contractor from any such liability if the response action contractor otherwise would be a responsible party referred to in paragraph (1), (2), (3), or (4) of §107(a) of this Act with regard to the specific facility or vessel that is the subject of the response action services undertaken by the response action contractor even if the response action contractor had not entered into a contract or agreement referred to in paragraph (1) of this section and had not engaged in the response or remedial action at a facility or vessel."

The **Chairman**. Thank you very much I'm glad to have you with us.

Mr. Breaux, in your prepared testimony, I believe you site the inflexibility of the Environmental Protection Agency's 100 percent recovery of cleanup costs as a disincentive to settlement.

I think you may agree that this policy is partly attributed to congressional outrage surrounding past EPA settlement policies.

What steps would you recommend Congress take in guiding the Agency in establishing settlement policies. Do you feel that statutory language is necessary, or would this action add to the inflexibility problem?

Mr. **Breaux**. I thank the chairman for his question. I think the main thing we have to do is separate the two items in the whole program. One is cleanup, and the second relates to who is liable for it.

The cleanup is proceeding at a snail's pace, and one of the things that is slowing down the cleanup is fighting over who is liable. What I am suggesting is that we separate the two.

I think you would agree that if we have 10 companies that have contributed to a toxic wastesite, and if each company knows that if they come forward and offer to clean up a portion or admit liability that they could be held for the whole 100 percent, under the current procedures, no one is going to be anxious to come forward.

But if they know that they could come forward and prove that they are only responsible for 10 percent, those companies are going to come forward and participate. If they don't, the same standard applies.

What I am suggesting, Mr. Chairman, is some kind of direction in the committee bill, a legislative direction to EPA. The courts have already said they can apportion liability, but they simply are not doing it.

So I think what we need in the legislation is an amendment which would direct them to go after an apportionment type of procedure, or allow them to set up a master to look at the evidence and to apportion liability.

I think they are hesitant to do it, Mr. Chairman, quite frankly, because of some of the problems they have had in the EPA in the past. They do not want to be perceived as cutting a sweetheart deal with one company over another, so, instead of trying to say what one company owes, they say every company owes 100 percent.

Well, that is the liability question. What I am suggesting is an amendment which would allow them to set up a procedure whereby the apportionment could be handled openly and in public, in front of God and Congress and everybody else to see what they are doing.

The **Chairman**. Now, suppose the aggregate of what each one says he is responsible for does not total 100 percent. How would you handle the difference.

Mr. **Breaux**. Well, that's the purpose of the fund, Mr. Chairman. All of the companies out there are now contributing to the fund, and if we find five or six companies that are responsible for, say, 85 percent, we make them go up and clean up that share, we make them pay the 85 percent, and if we can't find anybody else, well, that's the purpose of the fund.

I would suggest that the fund would pay for the remaining 15 percent.

But I think this way will work faster.

The CHAIRMAN. Could the EPA say, well, you claim you're liable for 30 percent, but we think you're liable for 40 percent. Would you want to give them that power to impose that 10 percent difference?

Mr. BREAUX. I would say to the chairman that it would have to be an approved settlement that the EPA would agree with, and if the company came in and offered testimony that they only put 30 percent of the problem in that hole, EPA can look at it and say, no, we know you're not responsible for 100, but we think you're probably responsible for 40 percent. They could stick them—or I don't want to use the word "stick" them—but assess them—probably a better phrase for all the people behind me—we could assess them 40 percent. And they would have to come up with 40 percent.

Because right now they can assess them for 100 percent.

The CHAIRMAN. Would you have a right of appeal to a jury on that, or would you give EPA power to settle it then and there?

Mr. BREAUX. One of the suggestions I make, Mr. Chairman, is that the committee consider a special master who would take the time to look at the testimony and make that definitive decision.

I'm sure they could appeal that decision if they disagreed with it. But right now, EPA——

The CHAIRMAN. And that would be binding on them; is that right?

Mr. BREAUX. That's correct.

The CHAIRMAN. The master's report.

Mr. BREAUX. That's correct.

The CHAIRMAN. I started to ask you if you have or could you make available language that would establish the administrative procedure for apportionment that you have described.

Mr. BREAUX. We would be glad to, Mr. Chairman. And our staff could work with your people.

The CHAIRMAN. If you could pass that on to the committee staff.

Now, has such a procedure been introduced in the House, and if so what is its status?

Mr. BREAUX. Not at this time, Mr. Chairman. We're sort of at the same place in time as you folks are over on the Senate side. We're still trying to work it out. I knew that you were having the hearing and I thought it would be an appropriate time to present our thoughts over here.

The CHAIRMAN. I think that's all the questions I have. The distinguished Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you. Congressman Breaux, you have a very interesting proposal here, one that is very attractive from what you say. Let me just ask you one question that's not quite clear in my mind.

Assuming company A comes forward and says, "I voluntarily admit to 25 percent of the problem." Where is the burden of proving that under your proposal? On company A?

Mr. BREAUX. The company who says that they would only be liable, Senator, for 25 percent would have the obligation to prove that that is all they are liable for.

Senator DECONCINI. To prove it to the EPA's satisfaction.

Mr. **Breaux**. Absolutely. Or the special master, if we set up a procedure for that.

Senator **DeConcini**. So it would still be left to either the EPA or the special master to make its independent judgment whether or not that was appropriate. Now, if the master or the EPA said, "No, we think you're liable for 45 percent," and the company says, "No, we're not, we'll settle for 30, but we're not liable for anything really more than 25," then what happens? Do you proceed with cleaning it up, and go to court over the difference?

Mr. **Breaux**. Basically that is correct, because after all the standard is not changed. I am not suggesting we in any way change the joint and several liability standard where any one company could be held liable for 100 percent, which is the current law.

I am only suggesting a scenario which would encourage them to come up and show what they are liable for.

Senator **DeConcini**. That so-called pressure or position would still be there.

Mr. **Breaux**. That's right.

Senator **DeConcini**. If EPA or the Justice Department could not in good conscience agree that what the company A was offering was substantiated.

Mr. **Breaux**. That's correct.

Senator **DeConcini**. That's a good idea. Interesting.

Thank you, Mr. Chairman.

The **Chairman**. Now, is it your idea that the EPA would first hear this matter, and would allot what it felt was a reasonable distribution? And if anybody was displeased, they would appeal to the master?

Mr. **Breaux**. We could either do it——

The **Chairman**. Or would they have further appellate rights to a higher court than that?

Mr. **Breaux**. What I am suggesting, Mr. Chairman, is perhaps, in the wisdom of this committee, looking at both the first instance being EPA and let them present their case to EPA, or perhaps the committee would be wise in suggesting that a special master be appointed on these matters from the very beginning.

And if the company disagreed with the finding of EPA or with the finding of the special master, then they could appeal it, just like we can appeal them at the present time.

The **Chairman**. Now, is this going to be before or after the cleanup?

Mr. **Breaux**. It would be before the cleanup. The suggestion—I'm saying that we're spending so much time right now on these liability schemes that we're spending as much money litigating who is responsible without cleaning up. This would allow us, I think, to determine the liability question much more quickly and then go to the time frame of cleaning up the site, which is our first purpose.

The **Chairman**. Well, does EPA know most of the people who are responsible for each site?

Mr. **Breaux**. I think they know most of them.

The **Chairman**. Then it's just a matter of distributing their liability.

Mr. **Breaux**. Well, if you have a site, Mr. Chairman, and you have 30 or 40 or 100 as in this case, the case I cited— they had 121 defendants, and what happened, they ended up suing 9 of them, and now the 9 are in various stages of suing the other 120 saying, "No, it's not us, we're only responsible for a part of it."

They're spending more money litigating that issue of liability than they are in cleaning up the site. And what I am suggesting is this method would allow us to cleanup the site and settle the liability question much faster.

I think the law allows us to do that. EPA is just, I think, a little hesitant on doing it because of previous problems, and image problems, quite frankly, that they've been engaged in in the past.

The **Chairman**. Have you had a chance to study carefully this Clean Water Act?

Mr. **Breaux**. Yes, sir. I am not suggesting we change anything under section 311 of the Clean Water Act as far as the standard is concerned.

The **Chairman**. In other words, you don't make any suggestions about that.

Mr. **Breaux**. No, sir.

The **Chairman**. But you are suggesting from then on, is that it?

Mr. **Breaux**. That's correct. We are not suggesting any changes in the Clean Water Act and the standard of joint and several liability in that area.

The only problem is here. This is where the problem has been, with regard to EPA being hesitant to apportion liability. I think we need some congressional direction to EPA to make them move in that direction.

The **Chairman**. Any other questions?

Senator **DeConcini**. No; thank you, Mr. Chairman.

The **Chairman**. Thank you very much.

Mr. **Breaux**. Thank you, Mr. Chairman.

The **Chairman**. Our next witness is Mr. Charles Schwenck, National Constructors Association, Irvine, CA.

Come around, Mr. Schwenck. You have 5 minutes. Just give us the thrust of your statement. We will put your written statement in the record without objection.

STATEMENT OF CHARLES SCHWENCK, NATIONAL CONSTRUCTORS ASSOCIATION, IRVINE, CA, ACCOMPANIED BY BILL RYAN, COUNSEL

Mr. **Schwenck**. Thank you, Mr. Chairman. My name is Charlie Schwenck. I am general counsel of Fluor Engineers. I have with me to help me answer any questions you may have on some of these technical aspects of our problem Bill Ryan who has been retained by the National Constructors Association to analyze some of these liability problems.

I am testifying on behalf of the National Constructors Association, but I have also been authorized to indicate to you that the other major associations in the engineering and construction field, the Association of General Contractors, the American Consulting Engineering Council, and several other associations all share our concerns as to what the problem is and also share our analysis of what the appropriate solution to those concerns is.

We come here with somewhat of a unique perspective on Superfund liability, different than what you've heard from other people, in that right now we are in a position where we have no liability and no responsibility for hazardous waste cleanup.

If we do nothing, we continue to have no liability. We are on the outside looking in, and we would very much like to help. Our associations represent the largest companies in the industry, those with the greatest qualifications to do the work.

But there is a tremendous impediment to us doing anything. If we come in and help with this cleanup, we are subject to a whole myriad of State theories of liability, plus the statute itself as it presently exists. The likelihood is that whatever we do, we will be held jointly and severally and strictly liable for any personal injury or property damage which arises thereafter.

So, we're being discouraged from coming in and helping.

The CHAIRMAN. Now, is that in the clean water bill?

Mr. SCHWENCK. Mr. Chairman, it's a matter of——

The CHAIRMAN. Is that in the bill that came from the committee?

Mr. SCHWENCK. The bill, S. 51, tries to help us with the problem with an indemnification approach which goes partway toward solving the problem, but doesn't help us entirely.

We are faced with a problem not only under section 107 of the act, which may make us strictly liable, but you've got State laws and theories of liability, court imposed, not statutory imposed theories of liability, which would make us liable.

As the bill came out of committee, it would indemnify us if there is a direct contract with the EPA and the EPA so chooses to indemnify. I can go into some of the technical problems with that bill, but it simply does not go far enough.

We go through the bid process of trying to decide whether we're going to pursue these projects, and we have to look at whether the risks are reasonable in light of the reward. Some of these contracts are quite small.

The liabilities are tens and hundreds of millions of dollars, perhaps 20 or 30 years down the road, and they are entirely uninsurable.

I've been through several of these bid processes with my management and it doesn't even look like a normal bid process. Instead of spending a few minutes on the legal problems and some time on what the commercial aspect of the bid ought to be, we spend days, all the way up to the board of directors, and we decide not to bid. Or, if we decide to bid, once we're awarded the work, we can't enter into the contracts.

This is happening. It's not hypothetical. It is, in fact, happening. California has attempted to award nine regional contracts for State Superfund cleanup work, and contractors have refused to sign the contracts, my firm included. In fact, there is a bid protest right now which may keep them from signing any contracts.

So they simply can't get on with the work. Bear in mind this is an entirely uninsurable risk. The insurance industry has simply indicated that they will not insure. And they have canceled any policies which relate to environmental cleanup work.

The solution, we believe, is first of all to have a national standard of care. And strict liability is not an appropriate standard of care for the people who are going to come in who did not create the hazard in the first place. It may be an appropriate standard of care for those who created the problem, but it is certainly not if you're trying to encourage people to cleanup something that was created by somebody else.

We believe that that national standard of care should apply whether the Superfund cleanup is being done under a contract with the EPA, or with a State agency, or with a private party.

It should be that the contractor should only be liable for bodily injury and property damage which arises out of his own negligence.

But we think you have to go beyond that. We think you have to have a limitation of liability if the risk/reward ratio is going to be appropriate to create an appropriate business atmosphere so that contractors can come in.

Otherwise, they're still not going to bid the work, even with a negligence standard. And we think you need a statute of limitations.

Both of those are essential also to get the insurance industry to come in and insure this risk.

Thank you, Mr. Chairman.

[The statement of Mr. Schwenck follows:]

NATIONAL CONSTRUCTORS ASSOCIATION

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June 7, 1985

STATEMENT FOR THE RECORD

Judiciary Committee
224 Dirksen Senate Office Building
The United States Senate

Re: Superfund Legislation -- Senate Bill 51 (Superfund Reauthorization Act of 1985) -- Need For A Uniform Standard of Responsibility for Superfund Cleanup Contractors

INTRODUCTION

The National Constructors Association represents a number of United States firms that are among the most capable in the country of performing remedial cleanup operations at Superfund sites. Our firms have been and continue to be very supportive of Superfund cleanup programs. However, we are extremely concerned that participation in cleanup activity will lead to imposition of liability without fault even though the cleanup activities are carried out with utmost care in accordance with the requirements of a response action plan which has been approved by the Environmental Protection Agency or the states. At present, a kaleidoscope of fifty different sets of state laws governs the standards of liability that may result from Superfund cleanup work. Moreover, the status of individual state law is ever-changing and often varies from case to case. Additionally, the strict, joint and several liability of Superfund itself may possibly be construed to apply to remedial contractors. Clearly, the uncertain and unpredictable status of the law as it may be applied to Superfund cleanup work operates as a strong disincentive for responsible contractors to enter the marketplace of Superfund cleanup, and thus inhibits the original purpose of Superfund -- to alleviate the potential, but substantial, health risks posed by thousands of dumpsites across this country.

The public policy of this nation requires that a national uniform policy be adopted with respect to the legal standard of liability of those firms whose only connection to the hazardous waste site is the performance of cleanup services. NCA believes that the most sensible remedy is to adopt a national standard of liability which is based on misconduct in the performance of the particular Superfund contract and which is applicable to the states. Additionally, a statutory maximum of financial responsibility as well as a rational statute of limitations are necessary to create a reasonable business risk environment so that qualified and responsible contractors can help carry out Superfund's purpose of cleaning up the environment. It should be noted that the typical Superfund site involves four categories of responsible parties: (1) the generators of the wastes; (2) the persons who transported the waste to the site; (3) the persons who arranged for the transportation to the site and (4) the owners and operators of the site. Unlike the cleanup contractor, each of these responsible classes will remain subject to the full panoply of potential liability theories of the various states under our suggested approach.

The remainder of this statement will discuss the unlimited, strict liability problems facing remedial contractors as well as suggest approaches which NCA believes will solve these problems.

BACKGROUND AND THE NEED FOR UNIFORM LEGISLATION

A. Superfund Cleanup Work is a National Priority and Problem that Requires a Uniform Approach.

There is perhaps no national environmental problem of more importance to the American people than the management of hazardous waste. Essentially, the problem is two-fold. First, is the need for adequate control and disposal of waste now being generated. Second, is the problem of identifying and cleaning up old and abandoned dump sites.

Recognizing the need for a national and uniform program to regulate the present generation and transportation of waste and to manage disposal sites presently in use, Congress has enacted a broad legislative framework to regulate the generation and disposal of toxic waste on a national level. The Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Solid Waste Disposal Act and other statutes are the foundation for this national regulatory structure.

With the enactment of Superfund in 1980, Congress addressed the more difficult problem of rectifying the legacy of past disposal practices. The extent of this potential threat to our environment is illustrated by the fact that, as of October, 1984, the EPA had designated 786 waste sites for the National Priorities List. Additionally, there are over 15,000 identified sites that are not on the list. Moreover, of the sites currently on the Priorities List, only six have been cleaned up in the first four years of the program.

Clearly, the cleanup of old and abandoned waste sites is a national priority. It is equally clear that the complex difficulties and hazards associated with the removal and subsequent treatment or disposal of these abandoned wastes cannot be accomplished safely without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Thus, any legislative attempt to promote the cleanup of hazardous waste sites must address the closely related problem of the potential, yet real, liability risks that face those firms which undertake Superfund cleanup work. Simply put, the legal standard of liability for a remedial contractor engaged in Superfund work should be uniform and not a patch-work quilt of various standards based on the provisions of different state laws and judicial interpretations in the various state and federal courts. The spectre of an undefined and unending liability is a serious deterrent for responsible contractors who are interested in engaging in cleanup work.

B. Neither the Principle Reasons for the Imposition of Strict Liability Nor the Traditional Factors that Determine Whether an Activity is "Abnormally Dangerous" for Purposes of Applying Strict Liability Apply to Superfund Cleanup Work

The potential application of the doctrine of strict liability to Superfund cleanup work is one of the greatest deterrents to those firms that are interested in Superfund work. Strict liability, as that term is used by our courts, means liability despite the exercise of the utmost care.[1] It is often referred to as liability without fault.[2] The courts of many states have imposed strict liability upon a variety of activities that are considered to be "abnormally dangerous."[3] Although the traditional premises for the imposition of strict liability do not apply to Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chains of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity.[4] The premise of strict liability is to impose liability upon those persons who "introduced into the community an abnormal risk of a serious character."[5] In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

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[1] See, e.g., Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 517 F. Supp. 314, 317 (N.D. Ill. 1981).

[2] Prosser & Keaton, The Law of Torts §75 at p. 534 (5th Ed. 1984).

[3] See, e.g., Restatement (Second) of Torts §§519 and 520.

[4] See, e.g., National Steel Service Center v. Gibbons, 693 F.2d 317 (8th Cir. 1982); (under Iowa law, doctrine of strict liability for abnormally dangerous activities applied to railroad hauling tank cars loaded with propane even though the railroad acted in conformity with federal and state regulations and without negligence); Chavez v. Southern Pacific Transportation Co., 413 F. Supp. 1203 (E.D. Calif. 1976) (railroad held strictly liable for harm resulting from explosion that occurred while transporting 18 bomb-loaded boxcars under a contract with the Department of Navy).

[5] Prosser and Keaton, The Law of Torts §78 at p. 555. (5th Ed. 1984).

The principle reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work.

The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. Rather, the risk was created by the generators of the substances found at the cleanup site and by those persons associated with the improper disposal. In short, the remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. In essence, the cleanup contractor acts as an instrument of the United States government in carrying out a governmental purpose. There simply is no justification for placing a remedial contractor in the strict chain of liability that applies to those who created the risk.

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste. Thus, while standards of strict liability may be appropriate for those who are responsible for creating the hazardous waste site, there is no rational basis for applying such standards to a remedial contractor.

In addition to the fact that the traditional justifications for strict liability do not apply to Superfund work, it is also clear that Superfund work is not an "abnormally dangerous activity" as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is "abnormally dangerous" before strict liability principles will be applied: (1) the existence of a high degree of risk of harm to the person, land or chattels of others; (2) the likelihood that the harm that results will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes.[6] Application of the fifth and sixth factors demonstrate that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate -- in fact, it is managed by the federal government and carried out under the direction and supervision of the EPA and the Corps of Engineers pursuant to a congressional mandate. Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.[7]

The National Constructors Association recognizes that some have raised the argument that remedial contractors should be held to a strict liability standard because such a standard will encourage the highest degree of care in the performance of Superfund work. This argument misperceives the nature of strict liability. The essence of the doctrine is that liability is imposed for undertaking the activity, not for the manner in which it is undertaken. Strict liability, therefore, deters the undertaking of the activity. Unlike liability imposed on the basis of a contractual obligation or negligence, it has no impact whatsoever on behavior once the activity is started.

Additionally, unlike the persons who are responsible for creating the site in the first place and who are presumably aware of the potentially harmful nature of their hazardous materials and, therefore, of the risks attendant to those materials, the remedial contractor often will not be in a position to weigh the risks inherent in a cleanup job before commencing physical work. This is particularly true with regard to abandoned sites because, more often than not, the remedial contractor will have no way of knowing in advance what he will encounter during cleanup operations. Simply put, there will be no blueprints to tell a remedial contractor what conditions or chemicals or gases are buried underneath the top soil of a hazardous waste dumpsite. No matter how carefully one plans and carries out a cleanup operation, it will be impossible to identify -- let alone, eliminate -- all risks before they are encountered. Thus, while it may be fair to impose strict liability upon those persons who created the problem on the basis that they, at least, were in a position to assess the risks of their enterprise, and they presumably created the risk for their own benefit, the reverse holds true for the remedial contractor who does not have sufficient initial information to assess the various potential risks of bidding on and receiving Superfund cleanup work.

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[6] Restatement (Second) of Torts §520.

[7] Under state law at present, however, each court would make a determination of whether strict liability should be applied to the activities of remedial contractors by analyzing these factors on a case by case basis. Given the general trend toward expanding theories of liability, the remedial contractors' potential liability is extremely unpredictable and virtually impossible to insure against.

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed."[8] As a result of the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste clean-up projects.

The problem of adequate pollution liability insurance has been recognized by Congress as it has called for studies concerning the availability of pollution insurance protection on reasonable terms. These studies resulted in a March 1982 Treasury Department Report entitled "Hazardous Substance Liability Insurance." As this Committee is undoubtedly aware, the Treasury report concluded that serious problems exist with respect to insuring pollution risks due to "the particular combination of liability and financial responsibility provisions which tend to render the liability exposure of the insurer too uncertain for traditional underwriting practices."[9]

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[8] Wall Street Journal, 3/19/85, "Risky Business: Insurers Are Shunning Coverage of Chemical and Other Pollution," p. 1.

[9] Department of the Treasury, Hazardous Substance Liability Insurance at v (March 1982).

The situation has not changed since 1982. It has become worse and is illustrated by the following letter that was written by an NCA member company during the first week of March 1985 to a state government regarding the company's decision not to bid work on an inactive hazardous waste site:

> Thank you for considering us qualified to receive the subject RFP. We have carefully reviewed the terms and conditions of the RFP and attended the pre-bid conference but we find, at this time, we are unable to resolve what appears to be an unlimited liability exposure. We must therefore respectfully decline this opportunity to assist you in this important assignment.
>
> I am sure we all recognize the current concerns in performing toxic and hazardous waste work. Specifically, a participating contractor is exposed to lawsuits, deservedly or not, for real or imaginary reasons, not only during his participation on site but for an unlimited period of time into the future. Given the fact that insurance protection for these risks is becoming essentially unavailable, without the hope of indemnification by the State, a contractor becomes a self-insurer against completely undefined risks.

SOLUTIONS TO THE DILEMMA OF UNLIMITED LIABILITY FOR CLEANUP CONTRACTORS

A. National Standard of Liability

NCA does not seek to exculpate remedial contractors from third-party liability. Rather, it urges Congress to establish a national standard of responsibility for remedial contractors only that is based upon misconduct.

The purpose of this national standard of liability is to create an environment which encourages responsible contractors to enter the business of cleaning up hazardous waste. Such a provision will permit contractors to enter into contracts to provide response action with an ability to estimate and control, from the outset, their exposure to damages.

Establishment of a federal standard of liability for Superfund cleanup contractors will be ineffective unless the states and local governments are obliged to follow the standards prescribed by Congress.

There are many areas where Congress has acted to prevent state laws from frustrating the objective of a federal statute.

In fact, in a number of areas, Congress has established maximum limitations to be placed on the regulated activity.[10] And, with regard to atomic weapons testing contractors, the last session of Congress enacted legislation which mandates that all claims against such contractors are claims against the federal government under the Federal Tort Claims Act.[11] As the United States Supreme Court has stated, "statutes limiting liability are relatively commonplace and have been consistently enforced by the courts."[12] Clearly, a limitation of liability provision for Superfund contractors is necessary to remove the present economic impediments that are discouraging private industry participation.

B. Adoption of a Limit on Liability and Statute of Limitations

Whatever the standard of care, the liability of remedial contractors should not be disproportionate to the compensation such contractors will receive from their cleanup activities, or financially responsible contractors will be deterred from participation in the cleanup. Additionally, a limit on the remedial contractors' liability is essential if there is to be any substantial hope of obtaining liability insurance. Accordingly, any liability provision should provide for a cap on the maximum level of financial responsibility of cleanup contractors.

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[10] *See*, *e.g.* Recreational Vessels, 46 U.S.C. §4306 (". . . a state or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title); Wholesome Meat Act, 21 U.S.C. §678 ("marking, labeling, packaging, or independent requirements in addition to, or different than, those made under this chapter may not be imposed by a State or Territory or the District of Columbia . . ."); Petroleum Marketing Practices Act, 15 U.S.C. §2806 (establishes sole criteria for termination of franchise relationship).

[11] Omnibus Defense Authorization Act, 1985, Pub. L. No. 98-525, §1631 (98th Cong., 2d Session).

[12] *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 89, 98 S. Ct. 2620, 2638 n.32 (upholding constitutionality of the liability limitation provision in the Price-Anderson Act for operators of private nuclear power plants).

Contractors are also subject to undue exposure and deterrence because of the long period of time which may lapse between their performance of work and the manifestation of harm from a non-sudden release. The insurance industry has stated that, if pollution insurance is made available in the future, it will be offered on a "claims made" basis only. "Claims made" insurance, in order to fully protect a contractor, will have to be maintained for 20-30 years. Contractors bidding on hazardous waste cleanup projects in the present have no way of calculating into their bids the cost of pollution insurance many years from now. Indeed, they have no assurance that insurance coverage will be available at all in future years. In order to reduce the deterrent to cleaning up the environment that this risk presents, and to ensure consistency among the states, a reasonable statute of limitations or repose should be established with respect to claims against remedial contractors.

C. Indemnification of Contractors

Senate Bill 51, as reported by the Committee on Environment and Public works, contains an indemnification provision which provides as follows:

> (2) The Administration may, in contracting or arranging for response action to be undertaken under this Act, agree to hold harmless and indemnify a contracting party against claims, including the expenses of litigation or settlement, by third persons for death, bodily injury or loss of or damage to property arising out of performance of a cleanup agreement to the extent that such claim does not arise out of the negligence of the contracting party.

There are at least three reasons why this provision is not adequate. First, it does not require the Administration to indemnify cleanup contractors; rather, it merely provides that the Administration "may agree to . . . indemnify." Any such provision should be mandatory. Second, the Administration may indemnify only "to the extent that such claim does not arise out of the negligence of the contracting party." (emphasis added). Thus, the provision is susceptible to an interpretation that there is no indemnification where there is a "claim" of negligence. Because virtually any civil action will include a negligence "claim," any such language should be amended to provide that "The Administrator shall indemnify the contracting party to the extent that any such damages awarded do not arise out of the negligence of the contracting party." Third, the provision does not provide for a cap on the maximum level of financial responsibility to the extent the indemnity by its terms does not protect the contractor against liability. Presently, the EPA's standard Superfund contract provides, in pertinent part, as follows:

> The Government will hold harmless and indemnify the Contractor against claims (including expenses of litigation or settlement) by third persons (including employees of the Contractor) for death, bodily injury, or loss of or damage to property arising out of performance of this contract, to the extent that such a claim is not compensated by insurance or otherwise. Any such claim within deductible amounts of the Contractor's insurance will not be covered under this article. Reimbursement for such liabilities to third persons will not cover liabilities for which the Contractor has failed to insure as required or to maintain insurance as approved by the Contracting Officer. (emphasis added). *

In addition to the technical deficiencies of the indemnification provision presently in S. 51, indemnification is not the answer to the liability without fault dilemma facing cleanup contractors. The issue should be how do we resolve this problem, and not how can we pass the liability on to the federal government. Moreover, permitting or requiring EPA to indemnify cleanup contractors with respect to contracts with EPA does not solve the unlimited and undefined liability problems that will face those cleanup contractors who have not contracted with the EPA but rather have contracted with one of the states or a responsible party to perform cleanup work. Clearly, the best approach to encouraging the expeditious cleanup of toxic waste by

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* While the EPA contractual indemnity is considerably broader than that contained in S. 51, it does not apply to state or private party cleanup and it may be in violation of the Anti-Deficiency Act, 31 USC §1341, and the Adequacy of Appropriations Act 41 USC 11(a), because it subjects the government to unfunded contingent and undetermined liability.

responsible contractors is to establish a responsible standard and limit of liability. Unless Congress creates a reasonable business risk environment for the cleanup of toxic dumpsites, prospective cleanup contractors will stay away from the Superfund market.

Conclusion

NCA urges Congress to enact legislation encompassing reasonable limits on the potential liability of cleanup contractors. Such legislation will permit contractors to proceed with cleanup contracts on the same basis on which they perform other contracts, being held liable for their own misconduct, but without the prospect of incalculable and potentially devastating liability which is beyond their control. Reasonable limitations on liability will encourage NCA members and other responsible contractors to proceed with the vital national enterprise of cleaning up the environment.

Respectfully submitted,

National Constructors
Association

NATIONAL CONSTRUCTORS ASSOCIATION

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Unlimited Liability of Superfund Cleanup Contractors

The National Constructors Association represents some of the nation's largest firms engaged in the design and construction of major industrial, commercial and process facilities worldwide. Our firms, many of which are at the leading edge of technological developments in the industry, certainly rank among the most qualified firms in this country in performing remedial cleanup activities at hazardous waste sites. They are, however, extremely concerned about the imposition of liability without limit or fault for remedial action contractors despite the exercise of due care in the performance of a Superfund cleanup contract.

The Problem

- Remedial action contractors currently face two distinct liabilities-- liability for future cleanup costs under the present Superfund law and third party liability under the varying state laws.
- Under the current Superfund law remedial action contractors, despite the exercise of due care and performance to the letter of contract specifications, could by virtue of their contact with the hazardous waste site be included in the definition of the owner, generator, or transporter subject to the strict, joint and several liability of Superfund.
- Liability for third party damages under state law adds the additional complexity of risks which continue years after contract completion, potentially exceeding both the contract amount and the company's net worth. Of particular concern is the potential application of strict or absolute liability--that is, liability without fault--for these damages.
- Insurance at one time available to handle these risks is currently inadequate, scarce and expensive. Future availability of adequate coverage at any price is in doubt.
- Future insurance, if available, will be limited to "claims-made" policies, which provide coverage only for claims which are presented to the insured during the policy's stated period. Specific "claims-made" policies would therefore have to be renewed annually long after the completion of the actual cleanup. Without the assurance of coverage for the indefinite period of the potential risk, these policies are completely inadequate for cleanup contractors.
- Because of the uncertainty of the legal standard of responsibility that may be applied to Superfund work and because of the complexity of the scientific and health aspects of handling toxic pollutants, it is impossible to even delineate the true scope of the potential liability facing a remedial contractor.
- These factors act as a deterrent to the participation of responsible contractors in the Superfund cleanup process.

The Policy

- The Superfund law was enacted to fund and implement a national program to clean up the country's worst hazardous waste sites.
- A standard of strict, joint and several liability was included in the statute presumably to deter the unlawful disposal of toxic substances as well as provide a mechanism for requiring the persons who caused harm through the disposal of those substances to pay for the costs associated with that harm.
- Strict liability should not apply to hazardous waste cleanup activities because the remedial contractors did not create the risk and because the national interest dictates that the work be encouraged, not deterred.
- It would be a policy contradiction to deter the cleanups for which Superfund was created. Yet that is the actual effect of its liability provisions.

The Solution

- The public policy of this nation requires that a national standard of liability be adopted regarding remedial action contractors.
- The remedial action contractor should be removed from the chain of strict, joint and several liability imposed by Superfund and a single standard of liability should be applied to its activities throughout the fifty states.
- Contractors should further be held responsible only for their negligent action or inaction as determined by the relevant industry standard at the time of the contractor's conduct.
- It is imperative that an absolute ceiling be established on the cleanup contractor's liability for release or threatened release of a hazardous substance, pollutant or contaminant. That ceiling and a rational statute of limitations are necessary to create a reasonable business risk to encourage responsible qualified contractors to carry out these cleanup activities.

The public policy of this nation demands that the problem of hazardous waste cleanup be handled in a timely and responsible manner. The health and well-being of countless communities now as well as future generations may depend on this nation's determination to face this seemingly limitless problem and move forward with its resolution. That clear public need is not well-served by a scheme of liability which discourages firms from taking on the actual cleanup.

The National Constructors Association urges Congress to establish a uniform national standard of liability for remedial action contractors.

The CHAIRMAN. Mr. Schwenck, could you supply the committee with an example of a contractor/engineer who is held liable for his work on a site cleanup?

Mr. SCHWENCK. Mr. Chairman, unfortunately there have been very few cleanup contracts let. Most of the——

The CHAIRMAN. You are mostly concerned then about the future?

Mr. SCHWENCK. We are concerned about the future. The legal theory for the liability is there. I can tell you that not contractors, but other parties who were not responsible for the activity in the first place, but, for example, innocent purchasers of land who didn't know there was anything there, have been held strictly liable.

The CHAIRMAN. Have you had a chance to study this bill that came out of the committee?

Mr. SCHWENCK. Yes, I have, sir.

The CHAIRMAN. What changes do you suggest in it?

Mr. SCHWENCK. Well, first of all, it provides for an indemnity which is not mandatory, only discretionary. That will not get contractors into the act. It applies only to direct contracts with the environmental protection agency. That is not sufficient.

Every contract we can get done under State and under private party contracts leaves more money for the EPA to go about its business, and S. 51 doesn't help the problem from that standpoint.

It does not provide a limit of liability, and I can't reiterate strongly enough, both from the contractor standpoint and from the insurer standpoint, that if we do not have an overall monetary cap on liability so that someone who is entering into a contract for $500,000 is not subject to $100 million of liability that is totally uninsured, we are not going to get contractors performing the work. The bill does not accomplish that.

There are some philosophical problems with an indemnification approach. You have to understand that any indemnification approach is likely to funnel away into victim compensation funds that were meant for cleanup. Although I think the indemnification approach can be used, it does have that disadvantage. It also runs afoul of the antideficiency statutes.

Senator DECONCINI. Mr. Chairman, would you yield for a follow-up question on the indemnity issue?

The CHAIRMAN. I would be glad to.

Senator DECONCINI. If the indemnity was mandatory in the language on page 88 of the bill, would that make any difference to you?

Mr. SCHWENCK. It would help, but it does not solve the problem of contracts other than with the EPA. It does not create a limit of liability, and that, I think, is clear.

Senator DECONCINI. Thank you, Mr. Chairman.

The CHAIRMAN. Do you feel that the potential for future liability is causing contract bids on cleanup sites to be increased?

Mr. SCHWENCK. I think the bids themselves have not been increased. That's because it's impossible to increase the bid in a manner which would protect the contractor, because you're talking about a liability is severalfold the price of the contract, and most of these contracts are reimbursable cost-plus contracts anyway. There is no opportunity to put in some kind of a contingency or a reserve to cover the problem.

I think what you will find is that the overall cost of the cleanup will be substantially increased because what the contractors will do when they get the contracts, if they accept them, is they'll be very conservative. They'll hedge the problems and won't come up with the kind of solutions that make good common sense, because they will be too afraid of the liability.

And that will increase severalfold the cost of the cleanup.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTOR. Thank you, Mr. Chairman, but I have no questions.

The CHAIRMAN. Distinguished Senator from Arizona.

[No response.]

The CHAIRMAN. The distinguished Senator from Iowa.

Senator GRASSLEY. Mr. Chairman, I don't have questions of this witness, but I would like permission to submit some questions for the next panel.

The CHAIRMAN. Leave them with the staff, and we will ask them to respond.

Senator GRASSLEY. Thank you.

The CHAIRMAN. Any other questions?

[No response.]

The CHAIRMAN. Now, have you made all the recommendations that you think are appropriate that should be made in the committee's bill?

Mr. SCHWENCK. We have legislative language which the various associations have agreed upon as of last Friday which has not been submitted to the committee staff, and we will be doing so within the next day or two, on an exemption approach.

The CHAIRMAN. We're going to have to act mighty quick. You better get any recommendations to the staff here right away.

Mr. SCHWENCK. We have had conversation with them. They do know our position, but we will get them a written legislative solution.

The CHAIRMAN. Thank you very much. You are excused.

Our next witness is Mr. Robert J. Hurley, president of Grant Gear Works, Norwood, MA.

Come around, Mr. Hurley. Without objection we will make your written statement a part of the record, and could you take 5 minutes to give us the thrust of your statement?

STATEMENT OF ROBERT J. HURLEY, PRESIDENT, GRANT GEAR WORKS, INC., NORWOOD, MA, ACCOMPANIED BY CAMERON F. KERRY, COUNSEL

Mr. HURLEY. Mr. Chairman, members of the committee, I hope you will bear with me. I'm a little bit nervous. I have never appeared before a congressional committee before, and I would add to that that this Bostonian flew down on a flight from Boston today with the L.A. Lakers.

The CHAIRMAN. Well, don't be a bit nervous. This crowd is not going to hurt you, and we're not going to hurt you. Anybody starts to hurt you, we'll protect you.

Mr. HURLEY. Thank you, Mr. Chairman.

I understand that the committee heard detailed testimony on Friday about the EPA and of the Environmental Protection Agency and the Department of Justice policies under Superfund.

I am grateful for the opportunity to come before you and talk about what it is actually like to live with these policies.

I have been living with these policies for 2 years. Our company, Grant Gear Works, is 108 years old, and manufactures special gears and a line of speed reducers. My brother, John, and I own and manage the company and we have worked at it all our adult lives.

All our personal assets are pledged to support the company's financing. We employ between 60 and 110 people.

Now, because of a situation that we did not create and never knew about, the company's survival is threatened. Our only plant in Norwood, MA is contaminated throughout with PCB's that were released long before Grant Gear was there.

Grant Gear does not use PCB's. It never has used PCB's. We bought the Norwood plant in 1979 and moved there in 1980. It was vacant. We did not know that the plant was once the site of manufacturers using PCB's and that PCB's had been dumped there, and we had no reason to know this.

In February 1983, we learned that a previous tenant, or owners and operators had contaminated other sites. At our expense, we hired engineers who determined that the ground and the plant were seriously contaminated with PCB's.

At about the same time we began our testing, the State environmental agency, the Massachusetts Division of Environmental Quality Engineering, known as the DEQE, started testing and their results confirmed ours.

There have been PCB reading as high as 37,000 parts per million on our property. EPA came in to carry out emergency response under CERCLA. From June to August they removed tons of PCB contaminated soil, some from hotspots on the Grant Gear property, but mostly from adjacent property.

Further study shows that the Grant Gear site still has many areas of contamination. The site has been proposed for the EPA's national priorities list.

Grant Gear has done all we can to cooperate with EPA and DEQE. Also, at our expense, Grant Gear has had all employees, present and past, tested for PCB involvement in 1983, and again in 1984. Fortunately all results were negative.

Through investigation we have found out that prior owners and operators of the site used approximately 1 million pounds of Arochlor 1254, which was the PCB compound identified as the pollutant at the site, between the years 1957 and 1966.

We were able to locate employees who were eyewitnesses to the disposal of electrical capacitor manufacturing wastes at the site, and in fact themselves helped to pour contaminated waste behind the plant almost a generation ago.

We have shared this information with DEQE and the EPA.

We sent out demand letters under CERCLA against the parties we believe are legally liable for this release. We seek reimbursement of our response costs which exceed $100,000 and indemnification of future costs, damages and other forms of relief.

Now the agencies are beginning a study which, if it goes according to schedule, will take at least 4 months. On the basis of this study, the agencies then plan a full RI/FS to determine finally what remedial action is needed to clean up the site. No one knows how long or how extensive this study will be. It will be an indefinite period beyond that before remedial action is completed and the site is considered clean.

Even then, the reality is that this site will never be the uncontaminated property we believed we were buying in 1979.

Grant Gear's problem, Mr. Chairman, is that Grant Gear may not be in existence by the time the studies and the cleanup are done. To remain competitive in our market, we have to invest about $2 million in new equipment and inventory. We need to place equipment orders now to bring this product to market within 18 months.

For years, we have had no trouble borrowing. However, under the threat of an open-ended liability for the full amount of cleanup costs, our usual sources of funds cannot lend unless they can be assured that we have a fixed dollar limit on liability or will not be liable at all.

We have tried to obtain a release of liability. We have tried to obtain an agreement with the agencies that would put a fixed ceiling on Grant Gear's liability. We have tried to get an agreement from the agencies to seek recovery from other potentially responsible parties in the first instance, and from Grant Gear Works only as a last resort.

The agencies are unwilling to enter into any such agreement at least until the RI/FS is completed. If it weren't for our need for financing to continue business, we could simply wait until the RI/FS was done. But by the time it is done, it is conceivable there will be no Grant Gear around to settle with.

I am told that EPA policy allows for early settlement with generators of hazardous waste described as de minimis. Evidently there is no early settlement for owners, even though they have not contributed to waste even de minimis.

I am told the recent Shore Realty case suggests that the CERCLA third-party defense does not apply to any subsequent owners regardless of whether they know of hazardous substances. I am also told that Superfund may allow equitable apportionment of liability among parties. If so, I believe Grant Gear's share of that liability should be zero.

It has never occured to me that eventually the final outcome would do less than make Grant Gear whole. I have difficulty believing that the Superfund was meant to put the burden on the innocent as well as those actually responsible for hazardous wastes.

But even if we have to be liable as a last resort, I cannot see the sense in putting us out of business in the meantime. If Grant Gear could limit our liability, we could borrow and stay in business until the problem is finally settled.

If we could have a standard of liability that recognizes situations such as ours, or a third party defense that clearly applied to subsequent owners who buy without knowledge of a release on terms at least as favorable as those of generators who contributed to a release, we could stay in business.

I really do not understand what can be gained by putting Grant Gear out of business and having the company and its employees suffer unnecessarily while the issue is decided. Superfund may have some safety valves, but those valves do not seem to be working, and that is my reason for coming here today.

Thank you.

[The statement of Mr. Hurley follows:]

STATEMENT OF ROBERT J. HURLEY
President, Grant Gear Works Inc., Norwood, Massachusetts

Before the Committee on Judiciary, United States Senate
June 10, 1985

Mr. Chairman and Members of the Committee,

The Committee heard detailed testimony last Friday about the policies of the Environmental Protection Agency and the Department of Justice under Superfund (the Comprehensive Environmental Response, Compensation, and Liability Act) dealing with contribution and preenforcement, as well as joint and several liability. I am grateful for the opportunity to come before this Committee and talk about these policies in real life -- about what it is like to live with these policies and try to carry on a small business under them.

I have lived with these policies for two years now. For 108 years, Grant Gear Works, Inc. has manufactured gears and speed reducers used in machinery. I am only the fourth president of Grant Gear in that time. My brother John and I own and manage the company. We have worked at the company all our adult lives. All of our personal assets are pledged to support the company's financing. Depending on how business and the economy are going, Grant Gear employs between 60 and 110 people.

Now, because of a situation we did not create and never knew about, the company's survival is threatened. Our plant and only place of business in Norwood, Massachusetts (owned by Grant Gear Realty Trust) is contaminated inside and out with PCBs that were released there long before Grant Gear ever came to Norwood.

Grant Gear does not use PCBs. It never has used PCBs. In 1979 and 1980, when we bought and moved to the Norwood plant, it was vacant. We did not know that the plant was once the site of manufacture using PCBs and that PCBs had been dumped there, and we had no reason to know this. We moved there from South Boston in 1980, purchasing the plant and renovating it with financing obtained through the Massachusetts Industrial Finance Agency (MIFA) (which guarantees investment capital for qualifying enterprises).

The presence of PCBs was not discovered until 1983, when we learned that one of the former owners and operators had manufactured electrical capacitors, which we also learned often involved use of PCBs. At that point, on our own and at our expense, we hired engineers to test the plant and the grounds for PCBs. Our engineers, E.C. Jordan Co., determined that the ground surrounding the plant was seriously contaminated with PCBs. Inside the plant, the concrete floor was impregnated with PCBs, and there were PCBs in the dust on surfaces in the plant.

At about the same time that we began to investigate the possibility of PCBs at the site, the state environmental agency, the Massachusetts Division of Environmental Quality Engineering (DEQE), responding to some of the same information, did testing of its own on an adjacent property that used to be under common ownership and also on our property. DEQE likewise found PCB contamination in the soil and sediment in many locations.

It was just two years ago yesterday that we first met with officials from DEQE and gave them a copy of the E.C. Jordan Co. study we had received two days earlier. DEQE then asked the EPA to come in and carry out an emergency response under CERCLA. Beginning at the end of June and into August, 1983, EPA did so, removing tons of PCB-contaminated soil. Most of this soil was from the adjacent property, which was under development, but some "hot spots" on the Grant Gear property also were removed. A subsequent study for EPA by NUS Corporation indicated that there are still many contaminated areas of the Grant Gear property with [illegible] contaminated at levels as high as 37,000 parts per million. Radar and magnetometer studies also indicated that there may be buried metallic materials. As a result, the site has been proposed for EPA's National Priorities List of the most hazardous sites in the nation.

At EPA's request, Grant Gear secured access to the site and closed off areas under removal. We have done all we can to cooperate.

While EPA was conducting its removal action, we wanted to be sure that the PCBs on the property and inside the plant were not threatening the health of Grant Gear's employees. At our expense, Grant Gear arranged for health testing for all of our employees and former employees who had worked at the site. We tested our existing employees again in 1984. We also wiped down all the equipment in the plant and asked the Massachusetts Division of Occupational Hygiene to come in and determine whether the PCBs presented a health risk to our employees. I am relieved to say that the Division of Occupational Hygiene concluded exposure is within recommended levels.

In addition, Grant Gear initiated an investigation of past ownership and operation of the site to determine the causes of PCB contamination. Through this investigation, we learned that prior owners and operators of the site have manufactured electrical capacitors and have used PCBs, and that approximately 1 million pounds of PCBs (mostly Arochlor 1254, the compound identified at the site) were shipped to Norwood; 95 percent of these were shipped between 1957 and 1966. We also were able to locate employees who were eyewitnesses to the disposal of electric capacitor manufacturing wastes at the site, and in fact themselves helped to pour contaminated waste behind the plant almost a generation ago.

We have shared all the results of our investigation with DEQE and EPA. To date, for our testing, cleanup, investigation, we have spent more $100,000 in response costs.

After EPA's emergency removal in 1983, nothing further happened with respect to the site until early this year. In January Grant Gear, through its attorneys, sent out demand letters pursuant to CERCLA to various prior owners and operators and other potentially responsible parties. Shortly after that, EPA sent out information requests to Grant Gear and to other entities who may be potentially responsible parties. In April, we -- my brother and I and Grant Gear -- filed suit in United States District Court in Massachusetts against the parties we believe are legally liable for this release seeking reimbursement of our response costs, indemnification for future costs, damages, and other forms of relief.[1] (Copies of a sample demand letter and of the complaint in federal district court are attached for inclusion in the record.)

DEQE, in cooperation with EPA, is now beginning to prepare a preliminary remedial investigation/feasibility study (RI/FS) which, if it goes according to schedule, will take about four months. On the basis of this study, the agencies then plan to do a further study. This second study will be the full RI/FS that will determine, finally, what remedial action is needed to clean up the site. As yet, no one knows how long or how extensive this study will be, but the working assumption is that it will take 18 months. It will be an indefinite period beyond that before remedial action is completed and the site is considered "clean." Even then, the reality is that this site will never be the uncontaminated property we believed we were buying in 1979.

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[1] Since these hearings are considering legislation for citizens' suits, it is worth noting that the Massachusetts Superfund law makes responsible parties liable for damage to real and personal property. See Mass. Gen. Laws c. 21E, §5(a)(iii).

Grant Gear's problem, Mr. Chairman, is that by the time the RI/FS is completed, we may be effectively out of business. We have determined that to remain competitive, we need to invest approximately $2,000,000 in new equipment and inventory, which has to be ordered in the next month in order to be in place by next year and to bring new lines of gears and speed reducers to market over the next 18 months.

Under ordinary circumstances, we would have no problem obtaining the financing for this investment. But Grant Gear is not in ordinary circumstances. As the owner of the site, we are considered a Potentially Responsible Party. As a result, we face exposure under Superfund's joint and several liability for the full amount of response costs. Until the amount of these costs are known or until our exposure is limited to a fixed sum, Grant Gear has to carry on its books a completely open-ended contingent liability. Because of this liability, we cannot obtain the financing we need to keep our business going in order to expand and to provide additional jobs or even to assure continued work for our present employees.

We have tried to obtain a release of liability. We have tried to obtain an agreement with the agencies that would put a fixed ceiling on Grant Gear's liability. We have tried to get an agreement from the agencies to seek recovery from other potentially responsible parties in the first instance and from Grant Gear only as a last resort. Through all these negotiations, we have offered to insure full access to the site.

Any of these agreements would enable us to obtain the financing we need and go about our business while the studies are done, the site is cleaned up, and responsibility for the cleanup eventually allocated. But because we are the owner of the site -- even acknowledging that Grant Gear never contributed to the PCB release, did not know about it, has not benefited from it, and indeed may be injured more than anyone -- the agencies are unwilling to enter into any such agreement. We last met with them 10 days ago, and I understand that they will be unwilling to do so at least until the RI/FS is completed. If it weren't for our need for financing to continue business, we could simply wait for the RI/FS to be done. But by the time it _is_ done, it is conceivable that there will be no Grant Gear around to settle with.

I understand that EPA settlement policy allows for early settlements with generators of hazardous waste who are in the _de minimis_ category, but evidently there is nothing comparable for owners even where they have even less actual responsiblity for a hazardous release than _de minimis_ generators.

I believe that, if we can survive until eventually the site is "cleaned" and our claims against other parties are resolved, Grant Gear may come out nearly whole. I believe this because it is what I believe is fair. I wish, though, I could be more certain that in its application, CERCLA allows for fairness. There is the so-called "third-party defense" in the statute which seems to apply to our situation because it allows us to prove that the release was caused by other parties over whom we had no control or with whom we were not in a contractual relationship and whose actions -- which occurred long before we had anything to do with the property -- were not foreseeable to us.[1] However, this does not seem to be the position the agencies are taking, and the recent _Shore Realty_ decision by the United Court of Appeals for the Second Circuit,[2] even though it involved subsequent owner of a hazardous waste site who knew at the time of purchase that hazardous substances had been released there, contains language suggesting that the third-party defense does not apply to _any_ subsequent owners.

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[1] 42 U.S.C. §9607(b).

[2] _New York v. Shore Realty Corp._, ___ F.2d ___, 22 E.R.C. 1625 (No. 84-7925, 2d Cir., April 14, 1985).

Even if Grant Gear is considered liable under the statute, so long as the statute allows equitable apportionment of costs after judgment with those parties who actually caused the release of PCBs at our site or who benefited indirectly from the release, I believe that Grant Gear's share of liability would be zero. But if joint and several liability is applied without room for any equitable apportionment, this would not be the case.

Mr. Chairman, I am not sure that when Congress first adopted this standard of liability in Superfund, you meant it to apply to someone like Grant Gear, who has no connection with the hazardous substance release itself and has acted as a good citizen cooperating with the agencies and helping them to determine responsibility -- at least not when other parties are available who do have a connection with the hazardous substance release and who have the financial wherewithal to contribute. But even if as an owner we may have to be liable as a last resort, I cannot see the sense in putting us out of business in the meantime. If Grant Gear could achieve enough certainty about our liability to allow us to continue with our business as we did before we discovered that our plant is the Norwood PCB Site, we could live with the situation.

In these remarks, I have touched on several ways we could achieve the kind of certainty we need. The application of the standard of liability to a situation such as ours is one. Another is in the application of the "third-party defense" to subsequent owners who buy without knowledge of a release and without any contractual relationship or control as to parties who cause the release. Still another is to allow settlement with such owners on terms at least as favorable as those of generators who have actually contributed to a release.

It would a waste and unjust for Grant Gear and its employees to suffer unecessarily while the Norwood site is cleaned and liability for the cleanup is determined. That, however, is the very real risk we face right now. And although Superfund may have some safety valves, those valves do not seem to be working here. That is why I have come here today, and I hope that my being here helps to give practical meaning to some of the abstractions of policy.

Senator SPECTER [presiding]. Mr. Hurley, is your liability for the contamination based solely on your occupancy of the premises at this time?

Mr. HURLEY. Yes, sir, it is.

Senator SPECTER. Do you have any idea as to what is the outside limit as to the cost for cleanup?

Mr. HURLEY. I really can't say. I've done some figures on my own, and I think it's probably going to be somewhere in the vicinity of $4 to $5 million.

Senator SPECTER. What did you pay for the premises when you bought them?

Mr. HURLEY. $1,150,000.

Senator SPECTER. And you have substantially improved them with the buildings necessary for the operation of your business?

Mr. HURLEY. Yes, sir, by about another $600,000.

Senator SPECTER. Well, it would be cheaper for you to establish your operation somewhere else from scratch than it would be to cleanup the contamination, wouldn't it?

Mr. HURLEY. There is only one problem. The property was purchased under a Massachusetts Industrial Finance Agency bond, and my brothers and my personal assets, plus the corporate assets, are pledged towards paying off the bond.

Senator SPECTER. Well, there is no question that you have very substantial liability for what has gone on there. The question that I am looking to is whether it isn't cheaper to leave no matter what your existing obligations are.

As you describe a cleanup operation, it would be more expensive than all that you have invested there.

Mr. HURLEY. If my figures are correct, yes it would be. But when we've asked, there have been no determinations of what the cost will be.

I have done some estimates on my own, based on what I have learned is the expense of removing a ton of soil.

Senator SPECTER. In your investigation to determine who left the contaminants there, you say you have been able to identify the company?

Mr. HURLEY. Yes, sir. Companies.

Senator SPECTER. Are they financially responsible?

Mr. HURLEY. Yes, sir, they are.

Senator SPECTER. So your point is that, if a claim is filed against you and you have the right to interplead or bring them in for contribution or indemnification, then you would have a procedure to protect your interests?

Mr. HURLEY. Yes, sir. We have already entered suit.

Senator SPECTER. Have you been sued yourselves? Has your company been sued?

Mr. HURLEY. No, sir.

Senator SPECTER. But you have filed suit against the parties which left the contaminants there?

Mr. HURLEY. Yes, sir.

Senator SPECTER. What stage is that litigation in?

Mr. HURLEY. Well, at the present time—I am not an attorney so I really can't answer that. Maybe counsel can.

Mr. KERRY. Senator, as of this stage, a complaint has been filed and we are in the first stages of discovery, and as yet most of the parties have not filed responsive pleadings.

Senator SPECTER. How many parties are there?

Mr. KERRY. There are, in total, four parties, not counting several individual partners who comprised one of the parties, and not counting the State and Federal agencies which have been joined as necessary and indispensible parties.

Senator SPECTER. Sounds like a very expensive and complex litigation process.

Mr. KERRY. That's true.

Senator SPECTER. Which court are you in?

Mr. KERRY. It's in the U.S. District Court for the District of Massachusetts.

I believe, by the way, that a copy of the complaint is attached to Mr. Hurley's written submission.

Senator SPECTER. Well, in a sense your procedure runs counter to the approach of being able to bring in third party defendants after you were sued by EPA. Here you've started this suit in advance, which I think would be somewhat unusual. Certainly it's contrary to the theory of wanting to be able to bring in a third party as defendant. Not that you shouldn't have the right in any event if you are sued by EPA, but you have anticipated the litigation where you would be a defendant, and have started an action on your own to try to hold responsible those who are liable to you.

Mr. HURLEY. Yes, sir. We have a problem of time. We don't have much, and we felt we had to move. What we had hoped we could do is get a settlement without going to court. That was our main aim.

Senator SPECTER. Well, it sounds like you have a very difficult situation on your hands, Mr. Hurley. We appreciate your coming before the committee and providing the information, and I think the committee would be interested in the progress of your litigation.

Would you identify your counsel who has testified?

Mr. HURLEY. Yes, he is Mr. Cameron Kerry of Mintz, Levin in Boston.

Senator SPECTER. Thank you very much.

Mr. HURLEY. Thank you, Mr. Chairman.

Senator SPECTER. I would like to call the next panel, the Honorable Charles D. Renfrew for the American Petroleum Institute, Mr.

Randy M. Mott for the National Association of Manufacturers, Mr. Edmund Frost, Chemical Manufacturers Association, Mr. T. Lawrence Jones, president of the American Insurance Association.

Gentlemen, we welcome you here. We appreciate you coming this afternoon, and we will begin with Judge Renfrew.

STATEMENT FROM A PANEL CONSISTING OF HON. CHARLES B. RENFREW, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE; RANDY M. MOTT, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; EDMUND FROST, ON BEHALF OF THE CHEMICAL MANUFACTURERS ASSOCIATION; AND T. LAWRENCE JONES, PRESIDENT, AMERICAN INSURANCE ASSOCIATION, ACCOMPANIED BY DENNIS CONNOLLY, COUNSEL

Mr. Renfrew. Thank you, Mr. Chairman.

I have a prepared statement on behalf of the American Petroleum Institute which I would like to make part of this record.

Senator Specter. Yes, it will be made a part of the record. All statements will be, and as you know from our procedure there is a request that the summaries be submitted in the most brief period of time practical. We have the light set for 5 minutes, leaving the maximum amount of time for dialogue and questions and answers.

Mr. Renfrew. Thank you, Mr. Chairman. I think there are a number of substantive issues that have to be addressed in this legislation, including such items as the source and amount of funding, joint and several liability, national health assessment, and the standards for cleanup.

But what I would like to do this afternoon in a few minutes is address four issues peculiarly within the province and expertise of this committee. And these are the issues of parties to an enforcement action, judicial review, citizen suits, and voluntary cleanup and settlement.

First I would just like to put CERCLA in some historical context. In the 1970's, we had an extraordinary amount of legislation designed to help safety and health and environmental matters, almost all of which were regulatory, which regulated the management and disposition of wastes, toxic and chemical.

Then it was discovered that there was a problem, and this was the problem: What to do about dormant sites. What to do about those areas which were abandoned and closed sites. And that was the reason for CERCLA.

CERCLA came about to identify those sites, establish some priority of dealing with them, seek out the parties who were responsible for them, and financially able. Where you didn't have the parties who had caused it, or you couldn't find them or they were not financially responsible, you had a fund to take care of cleaning up the so-called orphan sites.

Now, first of all I would like to address the problem of the parties to an enforcement action. Under the proposed legislation here, no claim for contribution or reimbursement can be made until the entry of a judgment against or until the date of a settlement in good faith. Now, such a procedure abrogates the Rules of Civil Procedure, rules 13 and 14, and 19 and 20, dealing with joinder and cross claims and counter-claims.

I think the chairman is well aware that the history of the law has been experience, and our experience in this country and in the courts of this country has been that the Federal Rules of Civil Procedure are the result of almost 40 years of experience of the courts, of the Congress and countless thousands of cases, and are best designed to achieve a fair result.

Indeed, rule 1 says that the rules shall be construed to secure the just, speedy and inexpensive determination of every action. The only justification given in the Government's request for setting aside the Federal Rules is that it might expedite the cases as far as their participation is concerned.

But I suggest, Mr. Chairman, that by requiring a second suit for contribution and indemnification involving the same parties, involving the same issues, is going to protract, prolong, not reduce the amount of litigation.

I would like to turn now to the question of judicial review. As you know, the scope of judicial review here in S. 51 contemplates that there shall be no right to go to court except in an enforcement action or in any action for reimbursement or recovery of costs.

This is extraordinary, Mr. Chairman. I think that this is perhaps a violation of constitutional due process. We know that the party affected by an agency's action is entitled to a hearing at a meaningful time and in a meaningful manner before the action is final. I refer you to *Armstrong* v. *Manzo* reported in 380 U.S. Reports, at 545.

But apart from just the constitutional concern that you should have about due process, we also have an amazing thing, not just the timing of judicial review, but also the scope. Instead of having the full range of standards that we have under the Administrative Procedure Act, the bill here contemplates that just two standards be used. Is the action arbitrary and capricious, or is it otherwise in accordance with law?

What standards have been left out? Under the Administrative Procedure Act, we have the standards of abuse of discretion, not supported by substantial evidence, or contrary to a constitutional privilege or right.

It seems ironic, Mr. Chairman. There is at least a public perception that one of the concerns of Congress has been that EPA has not carried out its mandate, at least in the earlier days of this administration, in enforcing the environmental laws of this country. If that is correct, and I believe it is a public perception, it seems ironic that that very agency would be given the power over American citizens, corporate and individual, without their having their traditional right of judicial review which is afforded in other administrative hearings.

Now, I would like to talk about citizen suits. As you know, any person can bring a suit against any person for an alleged violation of an order, a condition, a standard, a regulation, or a requirement under CERCLA.

I suggest that because CERCLA deals with remedial matters, it's not a regulatory act—it's remedial; it's designed to clean up abandoned, closed sites—that it is not appropriate for the citizen suits of the type provided for here.

People who are affected who live in the area already have the right to participate in such suits. Clearly to give anyone the right to sue any person really takes the discretion away from the EPA in establishing the national contingency plan, the priority of sites that must be dealt with, and in effect Balkanizes them.

It's a race to the courthouse to get your site fixed in your particular area, rather than going through a national program of dealing with those most harmful. It seems to me that if the citizens' suit continues in its present form, coupled with the right to attorney's fees, that the Superfund Improvement Act of 1985 will really be the Attorneys' Relief Act of 1985.

Finally, I would like to talk about the voluntary cleanup and the voluntary settlements. I think as this committee well knows that if all of the cases that are filed in our courts were tried, we would clog our courts and nothing would be done.

It's essential to have settlements. This committee has worked toward encouraging settlements. The whole history of recent years has been working toward a number of alternative dispute resolution, methods, looking toward the parties voluntarily resolving their differences outside of court.

Indeed, it's contemplated that if we are to achieve the cleanup we need, we will have to do it through voluntary means in large part.

There are at least two areas where this committee could assist in that. One is where there is the transportation of hazardous wastes removed from a site by someone that is a licensed transporter to a site which has been licensed and approved by the EPA, but the liability of the original generator still does not cease. There has to be some cap, some termination on this liability.

Senator SPECTER. Judge Renfrew, are you close to concluding?

Mr. RENFREW. Yes, I am.

The other problem in the voluntary area is where the parties identified and solvent are perhaps responsible for 75 percent of a site and are willing to clean up their shore, but there has been a reluctance on the part of the EPA to have the so-called orphan share paid out of the fund. I think it is necessary for there to be some legislative direction to the EPA to use the fund for cleaning up the so-called orphan share.

I conclude, Mr. Chairman, by saying that if these concerns that I have addressed are met, I think that the Superfund Act can be a substantial weapon in the struggle for a cleaner environment.

And I think we must do so, but we must do so in a fair and equitable way.

Thank you.

[The statement of Charles Renfrew follows:]

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202-682-8100

Charles J. DiBona
President

June 7, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The American Petroleum Institute appreciates the opportunity to present its views on S.51, the Superfund Improvement Act Amendments, as reported by the Senate Committee on Environment and Public Works. API was pleased to learn that the Committee on the Judiciary would be reviewing this important piece of legislation. We believe certain revisions in S.51 are necessary to return the underlying Act to its original purpose -- the prompt and efficient cleanup of abandoned waste sites. We ask that this letter and the attached statement be made a part of the record.

In 1976, Congress passed the first major piece of environmental legislation dealing with the management of hazardous waste -- the Resource Conservation and Recovery Act. Central to this comprehensive regulatory statute was the notion that persons managing hazardous waste should have adequate financial resources and employ sound technical know-how to avoid the release of these hazardous substances into the environment.

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund law to mandate the cleanup of abandoned or closed waste sites contaminating the environment. Again, Congress adopted the approach that the polluter should be held responsible for the wastes he generated and/or improperly disposed of. However, unlike RCRA, CERCLA covered conduct which may have occurred many years before its enactment. When the law was put into practice, its retroactive nature, combined with judicial interpretations finding that it allowed the imposition of strict, joint and several liability, exposed small and large companies to staggering and unexpected financial obligations associated with the cleanup of waste sites. Moreover, it stifled any thoughts these parties had of voluntarily undertaking a cleanup at a site for fear that such response actions could be deemed an admission of guilt or a supervening cause of damage, thereby rendering them liable for all cleanup costs. As if this were not enough, parties learned that they would not be relieved from future liability when they agreed to cleanup a site and send the wastes to a federally-permitted RCRA disposal pursuant to the government's direction. The prospect of being held jointly and severally liable at yet another waste site would discourage even the most cooperative private party.

The result of all this has been much litigation and very little cleanup. S.51, as reported, would exacerbate the situation.

S.51 would abrogate a number of the Federal Rules of Civil Procedure in waste site cleanup litigation including impleader, joinder of claims and joinder of parties. It would also deny effective and timely judicial review of oppressive administrative orders. S.51 would depart from the objective of CERCLA by introducing a so-called "victims assistance demonstration program," perhaps more aptly termed a venture into national health insurance. It would also permit the disruptive interference of citizen suits which would impair the effectiveness of a cooperative government-private party effort so essential to the accomplishment of CERCLA's objective.

API believes that if the substantial resources of the private sector are to be mobilized to complement those of EPA to bring about the needed cleanup, then Congress must take the lead. This Committee, in its important review of S.51, is in the position to lead this effort. Specifically, API maintains that the Judiciary Committee must first, eliminate certain provisions of S.51 which will compound the inequities in CERCLA and second, provide new incentives which will secure private party response actions.

S.51 as reported by Senate Committee on Environment and Commerce should be revised to:

- o Provide parties a meaningful opportunity to receive judicial review of administrative orders by allowing a court to conduct a preenforcement review;

- Provide an effective forum for the settlement of claims and controversies in accordance with the Federal Rules of Civil Procedure, and
- Avoid the unnecessary and harmful expansion of the Superfund program to include controversial victims' assistance demonstration programs, inflexible health assessment responsibilities, and disruptive citizen suit provisions.

To facilitate greater private party action, the Judiciary Committee should include as part of the reauthorization package:

- Discretionary authority for the courts to apportion the costs of response among responsible parties based upon their contribution to the problems associated with the site. Factors such as the volume and toxicity of the wastes sent to the site, the ease of cleanup or other relevant factors should be part of a court's equitable authority to arrive at a fair share approach.
- Authority for EPA and the courts to use the resources of the Superfund to cover the shares of insolvent and unavailable parties in apportioning the response costs among parties, and
- Explicit statutory language releasing a private party from future liability at primary and secondary waste disposal sites when the party performs a response action in accordance with a government order or agreement, or at the direction of the On-Scene Coordinator.

These revisions will not endanger EPA's enforcement efforts; indeed, they will encourage parties to cooperate with the government in this important and burdensome job. API believes that through a combined industry-governmental effort the cleanup of waste sites can be advanced substantially in the best interests of the nation.

API appreciates the opportunity to submit its views on S.51. We remain ready to supply additional information on any of the issues should you or the other members of the Committee have questions.

Sincerely,

STATEMENT OF
THE AMERICAN PETROLEUM INSTITUTE

A. INTRODUCTION

The American Petroleum Institute (API) appreciates the opportunity to provide its views to the Senate Judiciary Committee on S.51, the Superfund Improvement Act of 1985, as reported out of the Senate Committee on Environment and Public Works. API is a trade association serving approximately 6,000 individual and 235 corporate members in all facets of the petroleum industry.

API supports the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and an increase in the rate of buildup in the fund. EPA has testified that it can efficiently and effectively spend $5 billion over 5 years. The petroleum industry is willing to pay more than its equitable share. However, the laudable goal of cleaning up hazardous waste sites should not serve as a reason for abandoning the carefully crafted Federal Rules of Civil Procedure developed and approved by our judicial system and Congress.

API commends the Judiciary Committee for its decision to review this important piece of proposed legislation. API encourages the Committee not to confine its inquiry just to provisions of S.51 but instead, to the extent the jurisdiction permits, to assess the entire Superfund program which now is over four years old. API believes the Judiciary Committee is currently in the position to make significant and important revisions to CERCLA which will make its principal environmental objective, the cleanup of abandoned hazardous waste sites, attainable in a more expeditious and efficient manner. To this end, API has several general suggestions:

1. The Superfund program must be made more equitable both in the sources of its funding and its liability provisions.
2. The statute should be revised to encourage, rather than discourage, private parties to undertake response actions, thereby increasing the overall cleanup efforts at sites, and
3. The statute should not be expanded to include new environmental problems, controversial health care programs, or citizen suit provisions which will only delay cleanup actions and dilute the resources of the Fund.

Reauthorization of the statute at unreasonable expenditure levels and with unrealistic program objectives will only waste manpower and resources. API and its members believe that sound planning and foresight by Congress during the reauthorization of CERCLA can spur significant improvements in the pace and effectiveness of cleanup efforts over the next several years.

B. THE SUPERFUND STATUTE MUST BE MADE MORE EQUITABLE

1. The Liability Provisions Should Be Made More Equitable

CERCLA imposes heavy liabilities on private parties for actions taken in most instances long before the statute was enacted. The courts have added to the burdensome retroactive liability of CERCLA by interpreting the statute as imposing strict, joint and several liability. See U.S. v. Chem-Dyne Corp. 572 F. Supp. 802 (S.D. Ohio 1983); U.S. v. Stringfellow, No. CV-83-2501-MML (C.D. Cal. April 5, 1984), 14 ELR 20385. Under a strict application of joint and several liability:

> [W]hen two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he caused. RESTATEMENT (SECOND) OF TORTS, §443A and §881 (1976). The burden of proof as to apportionment is upon the defendant who seeks to limit his liability. Id. at §443B. Nonetheless, where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Id. at §875.

See U.S. v. A&F Materials Co. Inc., 578 F. Supp. 1249, 1255 (S.D. Illinois 1984). Put into practice, this means that generator who may have contracted with a waste site owner or operator to properly dispose of waste materials many years ago, can be held liable for the response costs of removing 100 percent of the waste materials that have accumulated at the site both before and after he sent his wastes there.

The government has argued that strict, joint and several liability is necessary to compel responsible parties to pay for response action. API believes, however that imposing mandatory joint and several liability for past actions, often taken prior to the enactment of legal standards inhibiting such conduct, is exceedingly harsh. Joint and several liability is especially unfair when rigidly applied to a minor waste contributor. API suggests that the harsh consequences of joint and several liability could be mitigated if the statute were amended to provide for an apportionment scheme similar to that outlined in U.S. v. A&F Materials Co., Inc., 578 F. Supp. 1249.

In that case, the court reviewed the legislative history of CERCLA and concluded that a "moderate" approach to joint and several liability was both fair and consistent with the intent of Congress. In the words of the court:

> the moderate approach promotes fairness because it does not indiscriminately impose joint and several liability. Rather, it makes rational distinctions based on such factors as the amount and toxicity of a particular defendants' contribution to a waste site.

Id. at 1257.

Briefly, under a moderate approach to joint and several liability similar to that adopted in A&F Materials, responsible parties would be given an opportunity to present evidence proving the extent of their respective liabilities at a waste site. Absent sufficient proof of divisibility of harm, the court would be empowered to apportion liability based upon factors such as volume, toxicity and treatability. As the court in A&F Materials recognized, tremendous potential for unfairness lurks behind a mandatory application of joint and several liability. Because some courts have ruled against apportionment unless divisibility of harm can be established, a statutorily - authorized apportionment scheme should be spelled out in any reauthorization package. See U.S. v. Chem-Dyne Corp., 572 F. Supp. 802. API believes that apportionment will promote fairness, and voluntary settlement and cleanup.

2. Apportionment Authority Should Include Power to Use the Fund for "Orphan Shares"

In an attempt to protect depletion of the Superfund, EPA has been unwilling to use the Fund for almost any purpose. At many sites there are known insolvent parties and unidentified contributors. Often it was the imprudent conduct of such parties which resulted in the environmental risks identified at the sites. API believes it would be a reasonable and wise use of the Fund to cover these "orphan shares" rather than imposing the costs on other parties.

This is especially true in the case of settlements where individual or groups of responsible parties are willing to tender the costs of their fair share of cleanup. The government's reluctance to accept good faith settlement offers for their equitable share has been identified as a significant stumbling block in resolving these cases. This reluctance led the Administrative Conference of the United States to adopt as its ninth recommendation allocating Superfund resources to pay the shares of uncooperative parties in order to achieve settlements with those willing to pay their fair share. See Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA", Administrative Conference of the United States, June 29, 1984.

API notes that in its recent published "Hazardous Waste Enforcement Policy", 50 Fed. Reg. 5034 (Feb. 5, 1985), EPA has indicated it will consider using the Superfund to pay for such "orphan shares". API believes this authority should be recognized and embodied in the statute. Otherwise, EPA will remain hesitant to use the fund for orphan shares because it could again encounter Congressional criticism of the sort experienced during the early years of Superfund program administration.

Furthermore, if it is embodied in the statute the courts, would have the authority to use the Superfund to cover "orphan shares". Parties should not be discouraged from taking voluntary action in the absence of an agreement with the government. Instead, they should be protected from later EPA intransigence by having the opportunity to go before the courts to prove their fair share of liability. The court could then direct payment from the Fund for cleanup costs expended beyond a party's fair share of responsibility.

3. S.51 as Reported Will Foster Needless Litigation and Amend the Federal Rules of Civil Procedure

API believes that one of the key incentives to private response action is a right of contribution. S.51, as reported, contains a right of contribution, but provides that "no claim for contribution or indemnification may be brought until after entry of judgment or date of settlement in good faith." S.REP. No. 11, 99th Cong., 1st Sess. 103 (1985). The Committee stated that this provision was intended to

> postpone counterclaims, cross-claims, and third-party actions; parties with counterclaims deemed compulsory under the Federal Rules of Civil Procedure shall pursue such claims after completion of the case-in-chief. This postponement allows the government to limit the number of parties and claims in its actions so that litigation may be resolved in a more efficient and expenditious (sic) fashion.

S.REP. No. 11, 99th Cong. 1st Sess. 44, 45 (1985).

By restricting the right of parties to bring those who could be jointly responsible before the court, S.51 will engender more litigation and only add unnecessary transaction costs. S.51, in effect, would allow the government to isolate a few "deep pocket" defendants and force them to shoulder the entire waste site liability. These defendants would have to undertake subsequent litigation to obtain contribution from other potentially responsible parties. Hence there are at least two, and perhaps more, legal proceedings on similar issues further burdening the federal judiciary unnecesarily.

The contribution provisions in S.51 are in direct conflict with the goals of the Federal Rules of Civil Procedure. Those rules, in general, and in particular the rules concerning impleader and joinder of claims and parties, were adopted to facilitate judicial economy and to avoid multiple suits and the threat of inconsistent judgments. See Owen Equipment v. Kroger, 437 U.S. 64 (1978); United Mineworkers of America v. Gibbs, 383 U.S. 715 (1966); U.S. v. Yellow Cab Co., 340 U.S. 543, (1951). Further, the specific procedures designed to foster judicial economy in complex litigation contained in Federal Rules 13, 14, 19, 20, 21 and 42 would be abrogated by the contribution provisions in S.51.

API believes that in the context of CERCLA litigation, aggregating parties and similar claims before a single decisionmaker would have a number of advantages in addition to judicial economy: (1) an opportunity in one hearing to hear all relevant scientific evidence and arguments related to site conditions, (2) a sufficient number of parties to ensure adequate resources are available to cleanup the site, (3) the jurisdiction to compel each party to pay its fair share of cleanup, and (4) a forum conducive to obtaining a workable settlement of the action because all players would be placed a similar footing before the court.

The fair and rational way to deal with multi-party CERCLA cases would be for EPA and defendant-parties to bring all potentially responsible parties before the court in one action. A statutory right of contribution is still needed to bolster such a provision, because there will be instances where additional parties are located or found to be solvent after judgment has been entered. And, a statutory apportionment scheme would facilitate resolution of disputes once responsible parties are before the court. API believes that the abrogation of the Federal Rules to accommodate EPA's isolation of a few vulnerable defendants is unfair and will engender counterproductive consequences. The contribution provisions proposed in S.51 would serve as incentives to litigate and as deterrents to settlement and cleanup.

4. S.51 as Reported, Extends Inequities Associated with the Use and Judicial Review of Administrative Orders

S.51, as reported, extends the authority of the President to issue administrative orders under both Section 104 and 106 of CERCLA. It also places severe limitations on the right to obtain review of administrative orders and constrains the scope of their judicial review improperly restricting access to the courts. Finally, it denies potentially responsible parties any right to a hearing before being required to comply with an ex parte order. API maintains that the limitations contained in S.51 regarding administrative orders are inflexible, unfair and unnecessary to ensure that cleanup actions are undertaken. S.51 simply fails to equitably balance the need for expeditious action with the due process rights of affected parties.

S.51, as reported, would amend CERCLA to limit severely the opportunity to seek meaningful judicial review of an administrative order issued either under Section 104 or Section 106 of CERCLA. Judicial review would be limited to one of three situations: (1) a Section 107 action to recover response costs already incurred, (2) an action to seek reimbursement for costs incurred under Section 106 or (3) an action to enforce the Section 104 or Section 106 order (including recovery of a penalty). In the first two instances, the costs will already have been incurred by the party; in the third instance, EPA could be seeking treble costs because of a party's good faith refusal to comply with the order. In each situation, the private party has no opportunity to seek any type of administrative or judicial review of the order before he is exposed to severe legal or financial obligations. API believes the prohibition against "preenforcement" review of administrative orders is unusually pernicious because of the magnitude of the task and sums often required in the cleanup.

In particular, EPA has argued that preenforcement review of Section 106 orders would hamper its ability to deal with imminent and substantial endangerments to public health and the environment. This is a vast overgeneralization. First, EPA has ample authority to use the Superfund to abate such hazards should time be of the essence. The proposed revisions to the National Contingency Plan would further strengthen this authority to take emergency action. See 50 Fed. Reg. 5862 (Feb. 12, 1985). Second, allowing preenforcement review, even for a Section 106 order will not unduly delay response action. Many federal statutes provide authority to compel action for emergency situations -- however, few, if any, limit judicial review. Courts can act quickly when asked to issue a preliminary injunction or a temporary restraining order. Third, a court in deciding whether to stay the effectiveness of an administrative order will have to be convinced that the public interest and the rights of person affected at the site are not endangered by issuance of a stay. In Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), the court succinctly laid out the four basic criteria for obtaining a stay of an administrative order:

1. Has the petitioner shown it is likely to prevail on the merits of its appeal?

2. Will the petitioner be irreparably injured without relief?

3. Will issuance of a stay substantially harm other parties interested in the proceedings?

4. Where lies the public interest?

These latter two criteria, both of which bear upon the equities associated with persons potentially exposed to hazards at a site will be considered by the court in deciding whether a stay is properly granted. As the court stated in Virginia Petroleum: "We come then to the public interest considerations, which we have indicated are crucial in this type of case". Id. at 927. Courts are able to act quickly and responsibly upon requests for stays of administrative orders. The burden of demonstrating the impropriety of an order will rest with the plaintiff. There is no reason to believe affording a limited preenforcement review, even of §106 orders, will adversely endanger public health and the environment.

To the contrary, such review will improve the process. EPA has often taken a "shotgun" approach towards pursuing potentially responsible parties, including those whose sole connection to a site might be a barrel found at the site bearing a label with the company's name. There is no compelling reason why a party which may have no legal responsibility at a site should be forced to comply with a §106 order even assuming he might later be reimbursed.

The government, understandably, would like plenary authority to order parties to perform response actions. However, the substantial exposure to response costs and perhaps even additional liabilities when a party is ordered to perform a response action -- no liability release is currently granted for such action -- argues for at least a limited opportunity for a neutral review of administrative orders. There is considerable potential, for example, for a §106 order to contain response measures beyond those which are necessary to abate the imminent hazard. Lack of a preenforcement review also allows the government to select response actions which are not cost-effective. S.51 in attempting to facilitate expeditious site cleanups, destroys a private party's right to any meaningful review of an administrative order. API strongly opposes the prohibition of preenforcement review in S.51, as reported.

C. CERCLA CONTAINS SUBSTANTIAL DISINCENTIVES TO PRIVATE PARTY CLEANUP

If sites containing hazardous wastes are to be cleaned up expeditiously, then voluntary private party action must be encouraged as a necessary complement to governmental cleanup. Currently, CERCLA fails to include certain basic legal protections for private party cleanups. Certain specific provisions actually deter such action. API believes that encouraging responsible private party response action at single and multi-party CERCLA sites is a worthwhile goal. CERCLA should be amended to encourage the expertise and the resources of the private sector to be used to help remedy this national problem which would have the salutary effect of terminating unnecessary legal proceedings for all parties, including the courts.

1. Full Releases Must be Granted to Parties Who Carry Out Responsibilities

API believes there is no greater disincentive to private cleanup than EPA's current policy of refusing to grant releases to those acting responsibly. This policy perhaps stems from Congressional criticism of the way the Act was administered earlier. Whatever the reason, it is unfair for the government to direct a party to undertake a cleanup in a manner -- an obligation that sometimes costs the party millions of dollars -- and then refuse to give the company a release after it has performed in accordance with the government's directions.

Section 107(d) should be revised as follows:

> Notwithstanding any other provision of this Act, any person who completes performance of a response or abatement action ordered, or agreed to be taken by him at a facility in accordance with the National Contingency Plan or at the direction of an on-scene coordinator, or tenders all costs of such response or abatement action agreed to between such person and a duly authorized Federal or State agency, shall not be liable further by way of contribution or otherwise for any costs of response, abatement or damages caused by any release or threat of release associated with the generation, transportation, treatment, storage, containment, or disposal of hazardous substances from the facility or at any redisposal facility.

If voluntary cleanup is to be encouraged, then parties, whether or not liable under §107(a), should be released from any future obligation after paying their fair share of liability or conducting their share of cleanup, when they act in accordance with a government order or an agreement with EPA. Further, the release from liability should be available to the party both for liability arising at the primary waste site and at subsequent disposal facilities.

Perhaps the best example of the problems that stem from the lack of release availability involves a cleanup requiring the transportation of wastes, offsite for subsequent disposal. A responsible party may be ordered or agree to take the materials to a permitted RCRA facility for disposal. Under current EPA policy, releases and threats of releases of the material at the secondary RCRA site, are the continuing responsibility of the CERCLA party. Moreover, it is conceivable that any hazardous substance release at the RCRA site could become the responsibility of the CERCLA party -- especially given the almost non-existent causation interpretations given CERCLA by the courts. See U.S. v. South Carolina Recycling and Disposal, Inc., 14 ELR 20272 (D.S.C. 1984). The prospect of ensuring the integrity of yet another waste site, and being held jointly and severally responsible for a combination of the CERCLA cleanup residues and the RCRA wastes at the secondary site, is a harrowing prospect. It acts as a strong deterrent to any voluntary involvement at either the primary or secondary site.

EPA has recognized that liability releases are a practical necessity if parties are to be expected to enter settlement agreements. The EPA's "Hazardous Waste Enforcement Policy" does indicate that releases from future liability will be available. However, the EPA Policy nullifies the utility of these releases by: (1) requiring "reopener" provisions be included in the agreements and (2) limiting the scope of the release only to the primary CERCLA site. The Agency's reopener policy would permit it to "reopen" and reexamine a "final" settlement agreement whenever site conditions present an imminent and substantial endangerment because previously unknown conditions are discovered or additional scientific information becomes available about the conditions that was not known at the time of the agreement. 50 Fed. Reg. 5040.

There are several problems with this "reopener authority". First, there is no reliable definition for an imminent and substantial endangerment. Indeed, recent court decisions suggest that the term means only what EPA wants it to mean. Second, there is so much scientific uncertainty surrounding the monitoring of groundwater and cleanup technology that it is likely that new information about the site and the cleanup will become available at some time in the future. Accordingly, the reopener provisions defeat any finality offered in an agreement with EPA.

In addition to the reopener problem, EPA has indicated it will not offer releases, regardless of their terms, for secondary sites. Therefore, the EPA policy fails to offer a party any meaningful opportunity to obtain a liability release.

API believes that much of the reticence to give a release is due to fears regarding Congressional criticism of past Superfund administration. It is therefore incumbent upon Congress to act to provide in the law a release from liability for response actions taken pursuant to a government order or agreement, or at the direction of an on-scene coordinator. To the extent that future response action becomes necessary, EPA can draw upon the resources of the Superfund or can go against other parties not subject to the order or agreements.

The availability of a release from future liability is a real and substantial incentive for private parties to undertake voluntary cleanup.

2. The Statute Should Not Impose Inflexible National Cleanup Standards

API opposes any attempt to legislatively impose existing environmental standards as "national cleanup standards"; such an approach will not only deter voluntary cleanup but could result in an unnecessary expenditure of Fund resources. As Professor Frederick R. Anderson observed in his study "Negotiation and Informal Agency Action: The Case of Superfund" (U.S. Administrative Conference, April 14, 1984:

> By far the greatest burden placed on CERCLA compliance is site cleanup to the levels of the various ambient air, water and groundwater quality standards issued under other federal laws.

Professor Anderson noted that while the rationale for the use of existing standards appears to be "unassailable", their application to CERCLA cleanups "will present technical difficulties while completing the conversion of CERCLA into a quasi-regulatory statute". Id. at 105.

He identified four important points against their use:

1. Sites present unique scientific and technical challenges that may make standards "inapplicable that were developed for other purposes";

2. The standards developed under the Safe Drinking Water Act, Clean Water Act, etc. are only "best-guess first approximations even for the specific purpose for which they were adopted, and many will have to be revised";

3. The RCRA disposal site standards are design rather than corrective standards and "do not match up well with CERCLA's need for remedial design for old sites"; and

4. The use of the standards even with a variance procedure to relieve specific cleanups from compliance with the standards is fraught with procedural problems -- Professor Anderson quotes a former EPA lawyer who predicted lawyers and technical consultants will earn large fees developing requests for use in the variance procedure, which will become a forum for proving case-by-case that the blanket policy was wrong.

Professor Anderson's conclusions are supported by other prestigious groups such as the National Academy of Sciences, which has prepared a useful inquiry into the methods for assessing and managing risk. See Risk Assessment in the Federal Government: Managing the Process (National Academy Press, March 1983). At best, existing environmental standards provide overly broad and not necessarily useful guidance in fashioning a CERCLA cleanup at a particular site.

S.51, as reported, would require remedial actions to attain a degree of cleanup which will "assure protection of public health and the environment", and "shall be relevant and appropriate under the circumstances presented by the release or threatened release..." API supports this approach as a reasoned and measured response to a scientifically and politically difficult subject. The choice of appropriate cleanup standards must be made in response to site conditions, relying upon good scientific judgment. API urges the Committee on the Judiciary to endorse the approach taken in S.51.

3. Onsite Response Actions Should Not Be Subject to Permitting Requirements

API supports broadening the section in S.51 that would exempt onsite removal or remedial actions from the permitting requirements of Subtitle C of RCRA, Sections 402 or 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899.

At many sites -- reported pursuant to Section 103(c) of CERCLA -- only a single responsible party is involved. Often, however, this party is reluctant to act voluntarily because once cleanup is undertaken, the previously "abandoned" site could be deemed an active hazardous waste management facility. This interpretation would require the party to obtain a federal Subtitle C RCRA permit. The delay and expense entailed in obtaining such a permit act as efficient deterrents to voluntary action.

S.51, while addressing federal permits, fails to address state and local permit requirements which could be equally onerous and burdensome. API believes that for onsite response actions, the added incentive of an across-the-board permitting exemption -- federal, state and local -- will secure needed voluntary action.

As Professor Anderson admonished in his report prepared for the Administrative Conference, EPA and Congress must avoid changing the character of CERCLA from one of a remedial nature to that of a regulatory statute. Although permitting is appropriate for ongoing, active facilities, it serves as a paperwork deterrent for abatement actions. S.51, as reported, would require onsite response work to protect public health and the environment. API believes expanding the permitting exemption for onsite response action will result in significant environmental benefits by securing more voluntary action.

D. THE SCOPE OF CERCLA SHOULD NOT BE BROADENED TO JEOPARDIZE THE EXPEDITIOUS CLEANUP OF SITES

API believes that the purpose and scope of CERCLA should remain the cleanup of abandoned, uncontrolled hazardous waste for which there is no responsible party. S.51, as reported, would add to Section 104 certain categories of substances for which there would be no CERCLA response action authorized. API supports such limitations as well as the thrust of those contained in Sections 101 and 113 of the Administration's Superfund proposal. Congress should return the Act to its original intent.

While S.51, as reported, contains certain rational limitations, it includes broad new initiatives which could severely jeopardize or hamper the effectiveness of the Superfund cleanup program. Notably, these include the requirement that broad and expensive health assessments be prepared, a victim assistance demonstration program be funded, and a burdensome Hazardous Substance Inventory form be completed by a large number of businesses. These programs, built more on speculation and fear than on fact, will divert the focus of Superfund away from cleanup to one of public compensation -- a shift in approach which will only exacerbate public alarm.

These new authorities, compounded by new citizen suit authority expand the scope of the Superfund program unduly without a demonstrated need.

1. The Need for a Victim's Assistance Program is Not Supported by The Available Evidence

API believes the victim assistance demonstration program in Section 129 of S.51, as reported by the Environment and Public Works Committee, would establish a bad precedent and should be deleted.

Under Section 129, a five year test program would be created in which five to ten areas deemed to be at "increased risk" of some disease or injury from the release of a hazardous substance would have their medical screening and treatment insured by Superfund when responsible parties have not undertaken to pay. During the initial demonstration phase, $30 million per year from general revenues would be set aside for this purpose.

Congress should consider the implications of this demonstration program if the program were to be extended in future years beyond what is contained in S.51. Proposals for public compensation schemes rest on the assumption that widespread health risks result from exposure to hazardous substance, that there is a general failure of individuals and society to provide compensation for the costs of chronic illness, and that the potential for explosive growth in the program's cost can be kept under control. The evidence now available does not support any of these assumptions. Furthermore, the seeds for explosive growth in program costs are already apparent in Section 129 of S.51.

a. No Widespread Health Risks from Exposure to Hazardous Substances

Available evidence does not support an assumption that many people are being subjected to significant risks from hazardous wastes. To the contrary, average life expectancy has been improving steadily and the overwhelming weight of scientific evidence suggests that the primary causes of cancer, the most prevalent chronic illness, are related to lifestyle factors such as diet, smoking, drinking rather than environmental exposure to hazardous substances.

According to a report, "Health, United States, 1984" released on March 22, 1985 by the U.S. Department of Health and Human Services, the overall life expectancy in the United States increased by four years between 1970 and 1983, a greater increase than in the previous two decades.

Testimony prepared for Congress in 1984 by Dr. Philip Cole of Epidemiology Resources Incorporated debunked the popular perception that the health of Americans is deteriorating and that cancer, for example, is on the rise. Dr. Cole added that cancer rates, other than those due to smoking, are stable or slightly declining. He expressed the view that diet, smoking and other aspects of "lifestyle" are the most important known causes of cancer -- far more important causes than occupational and environmental exposure to hazardous substances.

The role of diet in causing cancer was recently explored by Dr. Bruce Ames, chairman of the Department of Biochemistry, University of California in Berkeley, in an article in Science magazine. Dr. Ames discussed the increasingly persuasive evidence that carcinogens naturally present in certain foods may play a significant role in causing cancer. He pointed out that human dietary intake of nature's pesticides is likely to be several grams per day -- "probably at least 10,000 times higher than the dietary intake of man-made pesticides." He concluded that "diet, which provides both carcinogens and anti-carcinogens, is extremely likely to be another major risk factor" (in addition to tobacco).

A number of other scientific and medical reports in recent years have implicated fatty diet as a major culprit in heart disease and cancer. Additional reports have linked alcohol consumption to certain types of cancer. As a result, the U.S. Health and Human Services Department has recently established an information program to persuade Americans to eat fewer fats and oils and more fiber, to limit their alcohol intake and to give up tobacco, with the goal of cutting cancer deaths by 25 percent by the year 2000. That is a modest goal -- the best scientific estimates suggest that nearly 70 percent of all cancers can be attributed to tobacco, diet and alcohol.

In 1981, Sir Richard Doll, an internationally recognized physician and epidemiologist, and his associate, Richard Peto, found that the best estimate is that occupational exposure accounts for about 4 percent of all cancer-related deaths and environmental pollution less than 2 percent. Similar estimates were published in 1981 by the Congressional Office of Technology Assessment.

Congress mandated in Section 104(i) of CERCLA an ambitious data gathering program. As discussed infra, this program is well underway and will provide information germane to any possible relationship between waste site exposure and health effects. Thus far, neither the Section 104(i) program nor other independent scientific sources indicate significant health risks are associated with waste site exposure. API believes at a minimum that Congress should not initiate controversial demonstration assistance programs or other compensation schemes before the results of the studies it mandated in the Act are available and have been reviewed by competent medical experts such as those in the Agency for Toxic Substances and Disease Registries.

b. Widespread Compensation For Chronic Illness Costs Now Exists

There does not appear to be any overwhelming failure of individuals and society to provide compensation for the costs of chronic illness. Through a wide variety of public and private means, about 85 percent of the U.S. population is insured for both loss of income and medical expense due to chronic disease -- regardless of the source of the illness.

These programs include private health insurance, Medicare, Medicaid, Social Security Disability Insurance, the federal Supplemental Security Disability Insurance, the federal Supplemental Security Income Program, workers compensation programs, private disability and life insurance, and specialized programs such as the black lung and harbor workers' and longshoremen's programs, veterans benefits, federal employees compensation and others.

It would be bad public policy to create a national health program under CERCLA to cover the very small percentage of the population which may not have some form of primary medical coverage. With the government providing "free" coverage under Superfund, there may be less incentive to continue private coverage. Existing insurers could declare their coverage to be secondary to Superfund insurance. Thus, the demonstration program would likely become the primary coverage for all diseases in designated areas.

c. Potential For Runaway Program Costs

National experience with health or injury compensation funds shows that costs often grow out of control. For example, the Black Lung program -- originally intended to compensate underground coal miners afflicted with certain employment-related lung diseases -- was amended in ways that gradually eroded any requirement for meaningful evidence that the illness was caused by coal mine employment. As a result, the program expenditures by 1981 had grown more than 33 times the original projection and now cost $2.5 billion a year. A 1982 General Accounting Office report to Congress stated that in 84 percent of the approved claims, medical evidence of black lung disability or death was either nonexistent, inconclusive or conflicting.

Similarly, in 1927 Congress passed the Longshoremen's and Harbor Workers' Compensation Act to compensate maritime employees injured on the job. The act has been amended 12 times since 1927, with major changes in 1972 that substantially increased and extended benefits and coverage. From 1972 to 1982, expenditures for this program grew more than 700 percent -- from $43 million to $355 million. The costs of this coverage have grown to be nearly as expensive for the employer as the average longshoreman's wage and resulted in increasing difficulty for employers to obtain insurance. In 1984, Congress -- recognizing the need to reverse direction -- amended the Act to reduce or eliminate certain benefits. For example, Congress excluded office clerical workers from coverage; repealed death benefits for compensated workers who die from causes unrelated to their occupational illness; and, in an effort to limit fraud, established a list of physicians who submitted false statements or charged excessive fees.

The potential for runaway costs in a broad hazardous substance fund would be even greater. Most hazardous substance fund proposals could and would apply to anyone alleging exposure in any way -- in other words, virtually any one in the nation. Thus, an enormous number of claims could be allowed -- involving cases of disease having little or no connection to hazardous substances.

d. S.51 Contains the Seeds for Runaway Cost

Under Section 129, everyone would be paid within a certain geographic boundary for medical screening, and the costs of what could be a broad range of illnesses associated in some way with a release. Lifestyle and workplace factors that might have played a role in any individual's medical condition would not be taken into account. As such, this is a national demonstration health insurance program financed out of Superfund.

An important reason why the costs of any public compensation scheme increase over time is the inability of medical science to determine whether exposure to hazardous substances caused particular cases of disease, rather than other factors such as lifestyle. Without a legitimate and clearcut way to identify cause and effect, virtually everyone who suffers chronic illness can point to prior exposure and thus make a claim.

Congress took cognizance of this problem when it mandated research on the relationship between toxic substances and disease. Until more information is available from those Congressionally mandated studies required under CERCLA, the medical care and screening in public health emergencies provided for in the existing law is adequate. Medical assistance is available under Section 104(i)(4) and (5) of the existing CERCLA.

Moreover, in the overwhelming majority of cases, individuals already have recourse under existing law, with well-established rights to sue based on negligence, private and public nuisance, trespass and strict liability. Several thousand cases of chronic illness, related to various types of alleged toxic exposure, are filed each year, demonstrating that such claims can be litigated without new federal programs.

Section 129 even fails as a basic piece of soundly drafted legislation. For example, the demonstration program would pay benefits on a geographic "cluster" basis without defining the boundaries of the cutoff. What about former residents? How long a residence would be required for individual eligibility?

The health care of the nation is important. But is would be wrong to create a massive back door national health care or insurance program under the regime of CERCLA. Consideration of national health care and national, disability and life insurance issues should be debated as such -- not under this legislation.

2. The Massive Health Assessment Program Mandated in S.51 Expands Existing Law Beyond What is Needed

S.51, as reported, would expand Section 104(i) of CERCLA into new subject areas and place unreasonable burdens upon the Agency for Toxic Substances and Disease Registry (ATSDR) to conduct health assessments at CERCLA and RCRA sites. API believes additional data about the potential for or the lack of health effects at waste sites is needed.

Many of the responsibilities required of the ATSDR in S.51 are already underway. Sophisticated epidemologic and toxicologic testing though, does not always meet arbitrary timeframes. To the extent that S.51 seeks to make more explicit the statutory duties already being implemented by the ATSDR, it jeopardizes the broad discretion needed by the Agency to direct its resources to the situations it deems most deserving of action.

However, beyond imposing new timetables and requirements, S.51 would finance the entire program out of the Superfund. Though there is an admonition in the new legislation to avoid delay in effecting site cleanups, the practical result of this broad new health assessment program is to divert funding away from site response action.

API believes there is ample authority, to expand the existing authority of the ATSDR to conduct health assessments at CERCLA sites. Many of the research and data gathering programs contemplated in S.51 are already funded through general appropriations to the Department of Health and Human Services. Accelerating these programs through Superfund exacts too high a price for expediency and could compromise the accuracy of such complex scientific study. ATSDR should be given discretion under a general statutory direction to ascertain whether there are health effects associated with hazardous waste sites. In essence, this is the direction contained in the original Superfund law. Congress should avoid imposing new duties and allow the ATSDR to continue its increasingly expanding Section 104(i) efforts.

3. The Requirement for a Hazardous Substance Inventory Form Creates New Burdens

S.51, as reported, would amend CERCLA Section 103 to place new burdens, to fill out forms for purposes of creating a Hazardous Substance Inventory Form. This new requirement, adopted in the wake of the Bhopal disaster, is unnecessary. Much of the required information is already in the hands of EPA, DOT, state and local governments. The transportation of hazardous substances is heavily regulated under federal law, and state and local governments have acted to fill necessary voids to protect their citizens.

In addition, there are sophisticated data banks available through various governmental sources as well as private organizations such as CHEMTREC, which offer immediate assistance in assessing proper response procedures.

API recognizes that Congress, in CERCLA, has expressed a necessary and important statutory interest in the contingency measures which will be in place in the event of an emergency. The regulations implementing the National Contingency Plan accomplish this objective. There is no lack of commitment within the public and private communities to respond effectively to the acute hazards posed by the release of hazardous substances. The addition of another layer of paperwork requirements, though, is a burden on business which is simply not a well demonstrated necessity. To the extent any further changes are needed in this area, they should not be made a part of CERCLA, but addressed in other appropriate legislation.

4. CERCLA Should Not Be Amended to Allow Citizen Suits

Section 138 of S.51 would add a new Section 118 to CERCLA authorizing "any person" to commence a civil action, regardless of the amount in controversy, against (1) any person, including the United States, alleged to be in violation of any standard, regulation, condition, requirement, or order under CERCLA, or (2) the President to compel performance of a nondiscretionary act or duty under CERCLA. In addition, it would allow a person to intervene as a matter of right in appropriate circumstances in government CERCLA and RCRA enforcement actions. This provision has the potential to disrupt government enforcement efforts and to divert substantial government, judicial and private resources from the waste site cleanup program.

API believes a certain amount of confusion exists regarding the nature of citizens suits. The majority of these suits are brought by well-financed, national environmental groups which are bent upon using the federal courts to establish programs and policies which they have unsuccessfully advocated before Congress and EPA. Few of these groups have any real nexus to waste sites.

Citizens living in the vicinity of waste sites are not without significant remedies at common law. Persons affected by the site have legitimate and legally recognized rights of action which may be asserted before an appropriate court. There are adequate legal remedies for these parties.

The question therefore is whether CERCLA, which unlike the other environmental laws does not contemplate the regulation of on-going, active waste management concerns, should be opened up to a barrage of suits brought by parties far removed from the sites to undermine the programmatic decisions made by EPA. API believes this would be a serious mistake. By practical necessity, Congress has recognized, through the adoption of a National Priorities List, that some sites will not be addressed and others will be addressed in logical order. This systematic approach is endangered by the inclusion of citizen suit authority in CERCLA.

Compounding the harm which citizen suit authority could do to the CERCLA program is the fact that S.51, as reported, literally invites second-guessing of programmatic decisions. For example, though S.51 would prevent interference where the President or State has commenced and is diligently prosecuting an action, the Committee on Environment and Public Works Report indicates this is a "case-by-case" determination. See S.REP. No. 11, 99th Cong., 1st Sess. 62 (1985). Moreover, the Report literally invites such suits by limiting narrowly the definition of "commenced" to require that a suit be filed or administrative order issued, and by suggesting the term "diligently prosecuting" is open to attack merely on the basis of the "scope of the remedy sought" or whether there is " an opportunity for citizens to intervene". Id. at 63. The "diligence" of every enforcement action is suspect on this basis -- especially if the government is conducting settlement negotiations.

API believes citizen input into the site cleanup process is appropriate and that EPA has accommodated this in its proposed revisions to the National Contingency Plan. See 50 Fed. Reg. 5862 (Feb. 12, 1985) However, the right of citizens to disrupt settlement negotiations, attack voluntary cleanups and bring ancillary claims into enforcement actions should not be allowed. In addition, the increased surveillance of these citizen suits which EPA and Justice will have to undertake to ensure favorable legal interpretations of CERCLA are not undermined in poorly argued cases, will only divert enforcement resources which could go elsewhere.

One other aspect of the citizen suits provision is of concern to API. The new statutory right of intervention would abrogate Federal Rule of Civil Procedure 24 by removing the requirement that before intervening, the potential intervenor must show that his interests will not be adequately represented by the parties to the action. Under S.51, the government would be required to show that a potential intervenor's interest will be represented in order to prevent intervention.

Inclusion of citizen suit authority endangers the important objective of prompt, efficient cleanup of waste sites.

5. Superfund Should Not Pay to Abate Contamination From Federal Facilities

S.51, as reported, would provide authority to pay from the Fund the costs incurred in providing alternate water supplies due to contamination from federal facilities. Given the large number of federal facilites which may be leaking, API believes this responsibility should be that of the federal government, not the industries taxed to create the Fund. Certainly, EPA has shown no reluctance to use its authority against private parties to fund such response actions. It is only fair that federal agencies should shoulder their burden. API believes this authority could be a significant draw upon the Fund and is inappropriate.

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C. E. Sandler
Vice President

June 13, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Hon. Charles Renfrew, the American Petroleum Institute (API) submits the following responses to the written questions sent to us after the conclusion of the hearing held before the Senate Judiciary Committee on June 10, 1985. Judge Renfrew asked that we convey his appreciation for being allowed to testify before the Committee on S.51, the Superfund Improvement Act of 1985.

Please feel free to contact us, should you desire any additional information.

Sincerely,

API RESPONSES TO QUESTIONS OF SENATE JUDICIARY COMMITTEE

1. · QUESTION: In those cases where a court has determined the harm to be indivisible, could your members support a "Remedy First, Liability Second" approach like that being proposed by the EPA and Justice Department where PRPs are brought into the suit at the beginning but their individual actions are stayed until the appropriate remedy can be established?

ANSWER: API members do not support the government's position which would mandate a "remedy first, liability second" approach to handling CERCLA cases. Nor do API members support the approach contained in S.51, as reported by the Senate Committee on Environment and Public Works, which would preclude contribution actions until a final judgment is entered against a party EPA has selectively chosen.

API believes that when EPA initiates an enforcement action it should attempt to identify the potentially responsible parties. Pursuant to the Rules of Civil Procedures (FRCP), those parties sued by EPA should have the opportunity, with the concurrence of the court, to join additional parties for a single proceedings determination of appropriate remedy and their respective liability shares. The court, using its discretionary authority under Rule 16 to structure the proceeding, should be free to schedule the taking of evidence and argument in one proceeding rather than have the determinations made in several separate trials involving the same witnesses and facts.

For example, if the "remedy" is determined on the basis of a lawsuit involving only the parties selected by EPA then the other parties have no practical input into the remedy determined. The "remedy now-liability later" process is unfair to excluded parties and guarantees multiple trials on identical issues.

API has developed legislative language based upon the decision in U.S. v. A&F Materials, 578 F. Supp. 1249 (S.D. Ill. 1984), which would allow a judge in one judicial proceeding to determine a remedy and to apportion liability among responsible parties based upon a set of reasonable factors. The API amendments would allow a judge to apportion shares of liability to insolvent parties and parties which cannot be identified, and to direct that the Fund be used to cover their contribution. API believes that once parties are aware of their respective liabilities, a remedy can be implemented in a fair and efficient manner.

2. QUESTION: Do you feel that the E.P.A.'s past inflexibility on its settlement policies was the foremost reason for the number of lawsuits and the delays in clean-up?

ANSWER: Yes. EPA's past inflexible settlement policies (e.g. the "80 percent rule," and refusal to grant liability releases) were the primary reason for the number of lawsuits and cleanup delays. Although EPA's interim settlement policy, 50 Fed. Reg. 5034 (Feb. 5, 1985) removes some of the obstacles to settlement, the Agency needs explicit directives from Congress on a number of settlement and cleanup issues. In particular:

a. EPA needs explicit Congressional authorization to use the Superfund to pay for so-called "orphan shares" attributable to insolvent, intransigent or unidentifiable parties. The Administrative Conference of the United States in its report on "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," June 29, 1984, recommended allocating Superfund resources to pay the shares of uncooperative parties in order to promote settlement with cooperative parties.

b. Congress should provide for the release from further liability of responsible parties who pay their share of response costs or conduct a response action in compliance with the direction of EPA.

c. The statute should authorize the courts to apportion liability among responsible parties in a manner similar to that used by the court in A&F Materials Co., Inc., 578 F. Supp. 1249 (S.D. Ill. 1984).

While the existing EPA settlement policy acknowledges that liability releases and orphan share authority may be appropriate, EPA in practice is reluctant to spend the Fund or grant releases for fear of allegations of impropriety or misuse of the Fund. If Congress acts on these and other issues in the reauthorization process, then settlement and cleanup will be facilitated.

3. QUESTION: Sec. 117 (pp. 83-84) of S.51 would amend sec. 104 of CERCLA to provide "an opportunity for a public meeting" and "a reasonable opportunity to comment" to the public with "a reasonable explanation of the proposal and alternative proposals" in the notice of meeting. If EPA remains free to respond to

emergencies, why should the Senate exempt the Agency from the requirements included in S.1080?

ANSWER: The Senate should not exempt EPA from the procedural requirements of S.1080. API believes, however, that Section 117 of S.51 is not inconsistent with the APA amendments proposed in S.1080; it simply does not go far enough in providing for meaningful participation in the remedy selection process.

Consistent with the U.S. Supreme Court's decision in Vermont Yankee, 1/ agencies and courts will not add procedures to the administrative process unless directed by Congress. It is the responsibility of Congress, therefore, to dictate in legislation the procedures the Agency must employ. The selection of remedy at a CERCLA site is a complex and detailed scientific process, and the more opportunity for exchange of information and meaningful consideration of the facts involved, the more accurate and cost-effective the chosen remedy is apt to be. The remedy selection process should, in short, more closely approximate the discovery process in litigation.

4a. QUESTION: Sec. 133(pp. 105-106) of S.51 precludes judicial review of "any challenges to response actions selected under Section 104" until "an action under section 107 to recover response costs" is commenced. If EPA has made an error in selection of a remedy, why should the parties objecting have to wait until the remedy has been constructed?

ANSWER: The parties should not be required to wait until an inappropriate remedy is implemented. The limitations on judicial review of both Section 104 and 106 contained in S.51 orders are ill-founded. The expenditure of Fund money and private party resources must stand the test of impartial scrutiny. If a remedial action fails to meet the criteria contained in Section 706 of the Administrative Procedure Act, then it should not be implemented. EPA should not be permitted to insulate itself from these safeguards; the lack of judicial review will only induce hasty, ill considered action. Persons who seek to challenge a particular response action should have an opportunity to

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1/ Vermont Yankee Nuclear Power Corporation v. NRDC, 435 U.S. 519 (1978).

demonstrate it is inappropriate. To preclude judicial review will only engender controversy and lend support to attacks upon the program.

Site cleanups involve complex decisions and in many cases enormous sums of money. To deny parties their day in court tundermines, rather than strengthens the program.

4b. QUESTION: If the public living near the site objects that EPA's remedy doesn't go far enough to reduce the hazard, since their objection is irrelevant in a cost recovery action. can it ever be raised and how?

ANSWER: As reported by Senate Committee on Environment and Public Works, S.51 would preclude the public living near a site from challenging the remedy decided by EPA.

The question puts into focus one of the undesirable results of the extreme limitations on judicial review proposed by S.51. Normally an inadequate remedy decision by EPA could be challenged in a U.S. District Court by persons living near the site who would be adversely affected. S.51 would do away with that right to effective judicial review. That traditional protection against wrongful agency action, long adhered to under the Administrative Procedure Act, should not be taken away. A judicial review system that has been effective for years should not be unraveled just to suit bureaucratic impatience.

5a. QUESTION: SEC. 133 (P. 106) amends section 113 of CERCLA to limit judicial review in cost recovery cases "to the administrative record." Can this be done consistent with due process without a requirement that all EPA data and methodologies be in the public record available for comment?

ANSWER: No. The key test of the adequacy of an administrative record under the APA is whether it contains the provisions upon which the Agency made its decisions. This does not require that every piece of information be contained therein. However, S.51 as reported, fails to guarantee that adequate information will be generated to make sound scientific and policy decisions. There must be adequate time and opportunity for input into the record by interested and affected parties. Moreover, there should be provisions to allow such parties to comment and evaluate the information entered into the record by EPA. By providing private parties an opportunity to cross-examine those involved in the creation of such information (as would occur under S.1080), Congress will ensure that sufficient and sound decisionmaking expertise is available to make these complex judgments.

5b. QUESTION: If new evidence in monitoring data from a site is developed after the administrative record is closed, how would parties bring it to EPA's attention and what requirement would exist that it be considered? How would it affect a cost recovery action?

ANSWER: API believes new information should be considered, but like new evidence discovered in any judicial proceeding, it should require reopening the record provided the new evidence meets the tests of relevance and materiality to the problems encountered at the site.

In a cost recovery action, any supplemental information obtained should be considered if it reduces a party's liability because it represents a reason for undertaking a less expensive cost cleanup. However, should it be discovered more extensive cleanup is needed, parties who have reached arms-length settlements with government, should not be required to pay additional money. This will act as a severe settlement disincentive. In either case, API believes the Fund should be tapped to either refund money to parties or finance additional cleanup measures. This is the type of flexibility and safeguards the Superfund was designed to accommodate, and it should be used accordingly.

COMMENTS OF CHEVRON U.S.A.

SENATE JUDICIARY COMMITTEE HEARING ON S.51

June 10, 1985

Chevron U.S.A. ("Chevron") is pleased to submit comments on Sections 126, 132, 133 and 138 of S.51, the Superfund Improvement Act of 1985. Chevron is committed to the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). We believe, however, that there are many aspects of the pending bill which would divert the CERCLA program and the resources of the Fund from the Act's original and most critical purpose -- the prompt and effective cleanup of sites. The Committee has indicated it will review only four sections of S.51. But we urge the Committee to expand its inquiry to the entire bill.

In response to the Committee's request, we have limited our comments to the four sections of S.51 identified by the Committee for review. We believe that these provisions would abrogate important Federal Rules of Civil Procedure ("Federal Rules") needed in CERCLA cases, give the Environmental Protection Agency ("EPA") virtually unfettered discretion by unnecessarily and dangerously limiting judicial review of orders and response actions, lead to wasteful Fund expenditures, discourage settlement, and result in a multitude of repetitive judicial actions. Implementation of these sections, without amendment, would be counterproductive to the paramount objective of prompt and efficient cleanup of hazardous wastes.

To expedite the Committee's review we have endeavored not to repeat in our comments the specific points made by the American Petroleum Institute ("API") on the four sections of S.51 under consideration. We incorporate and fully endorse API's Statement.

A. Pre-enforcement review.

Summary of Bill.

Proposed section 133 would limit judicial review of any challenges to a response action selected under CERCLA section 104 or any order issued under CERCLA sections 104 or 106 to actions for: (1) recovery of response costs or damages or for contribution or indemnification under CERCLA section 107, (2) enforcement of an order issued under sections 104 or 106 or to recover a penalty for violation of such order, or (3) reimbursement under section 106(b)(2).

Judicial review of issues concerning the adequacy of any response action would also be limited to the administrative record under section 133. The court would be required to uphold the response action unless it was arbitrary and capricious or not in accordance with the law. Procedural errors would be reviewable only if the response action would have been significantly changed had the error not been made.

Proposed section 133 would allow persons to seek Fund reimbursement for response actions ordered to be performed under CERCLA section 106 if: (1) they can show by a preponderance of the evidence that they are not liable under CERCLA section 107 and that the costs for which they seek reimbursement are reasonable, or (2) if they are liable for response costs under section 107, they demonstrate that the decision in issuing the response action order was arbitrary and capricious or otherwise not in accordance with law, based on the administrative record.

Comments.

If these provisions were adopted, the EPA would enjoy a unique administrative status in CERCLA actions --

virtually total freedom from the strictures of the Administrative Procedure Act ("APA") and nearly unlimited discretion in the cleanup actions ordered and undertaken. It would be exempt from any meaningful pre-issuance procedural requirements, and any meaningful post-issuance review. The potentially responsible party ("PRP") could not challenge an action at all prior to enforcement and then only by a showing that the agency acted in an arbitrary and capricious manner. The well accepted and judicially examined criteria for review set forth in the APA are disregarded. The equitable balance struck in the APA between the need for agency action to be implemented in a timely manner and the right to review by affected parties should not be dismantled by section 133.

In addition, the arbitrary and capricious standard for overturning agency response orders is unfair and inappropriate. Among other things, this standard completely obviates consideration of cost-effectiveness and risk-assessment, which are critical elements of the National Contingency Plan ("NCP"). Moreover, it may not be a sufficient standard to correct an agency's abuse of discretion or a violation of its own rules. The arbitrary and capricious standard is particularly inappropriate in light of the virtual absence of any meaningful opportunity for PRPs and the public to influence the EPA's selection of the response action embodied in the order.

These extraordinary limitations on any meaningful review of agency actions are unnecessary. In many cases, instantaneous action is not necessary to avoid harm. Where it is, not all the steps of corrective action set forth in a remedial order are necessary to abate the imminent harm. Those which are necessary could be taken while those which can be delayed may be subjected to judicial review without endangering the public interest. In any event, as the API sets forth in its Statement, the courts must currently consider the public interest in determining whether to grant a stay of an agency action. This legislation is not needed to assure that courts will not unduly delay addressing emergency situations. Where appropriate, courts should continue to have the authority to stay an order and grant pre-enforcement review.

Section 133 also purports to remedy any errors in the EPA's judgment as to the required response action by permitting the PRPs to seek reimbursement. Yet, the standard which the PRPs must meet in such an action is so onerous or unrealistic as to make the remedy meaningless. Virtually no administrative record exists to support most CERCLA cleanup orders -- certainly no record of the kind contemplated by the APA. Thus it is simply implausible to show, on the record, that an EPA order is arbitrary and capricious. The effect of the section, therefore, is to presume that the EPA-ordered remedy is correct and to leave the PRP with no means or opportunity to demonstrate otherwise.

More importantly, the so-called remedy could not undo the damage caused by selection and implementation of an unnecessary, ineffective or unfair response action. Pre-enforcement review must be available before the response action is undertaken unless the public interest would be harmed by such review. Failure to provide such review may lead to improper remedies and a waste of private resources or of Fund moneys.

Finally, and more specifically, we note that section 133 authorizes judicial review of a CERCLA section 104 or 106(a) order in an action to recover a penalty for a violation of such an order. The provision, however, does not prohibit the government from imposing daily penalties and treble damages for noncompliance prior to judicial review. The court in Aminoil, Inc. v. United States E.P.A., (C.D.Cal. 1984) 599 F.Supp. 69, held that the assessment of penalties and damages without prior review, even in an emergency situation, violated due process rights. Section 133 should be revised to clarify that penalties cannot accumulate prior to review.

B. Contribution and parties to litigation.

Summary of Bill.

Proposed section 126 provides that, in a civil or administrative action under CERCLA sections 106 or 107, no claim for contribution or indemnification may be brought until after the entry of judgment or the date of a settlement made in good faith. Any person who enters into a good faith settlement under CERCLA would be protected against claims for contribution regarding matters addressed in the settlement. The provision would not affect the right of the government or any settling party to seek contribution or indemnification against any nonsettling party. However, in such actions, the rights of a state or a private citizen would be subordinate to those of the United States.

Comments.

Section 126 would abrogate the primary functions of Rules 14, 19, 20 and 42 of the Federal Rules by virtually prohibiting both the joinder of involved parties and the filing of counterclaims and cross-claims during the case in chief.

Rule 14(a) permits a defendant to bring in as a third-party defendant any person "who is or may be liable to him for all or part of the plaintiff's claim against him." Joinder of persons under Rule 19(a) is mandatory if "complete relief cannot be accorded among those already parties." Rule 20(a), providing for permissive joinder, states that persons may be joined as defendants "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction or occurrences and if any question of law or fact common to all defendants will arise in the action". (Rule 13(h) authorizes the filing of counterclaims or cross-claims in conjunction with joinder pursuant to Rules 19 and 20.) Finally, Rule 42 specifically authorizes the court on a case-by-case basis to determine whether consolidation of actions or separate trials are warranted. Factors for consideration are avoidance of unnecessary costs or delay, convenience, avoidance or prejudice, expedition, and economy. Joint or separate trials may be ordered for an entire action or on any individual counterclaim or cross-claim.

Section 126 would substantially override the time-tested benefits of all of these Federal Rules. In particular, because the government has continually asserted joint and several liability against defendants in CERCLA actions, the elimination of permissive joinder under Rule 20 is one of the most significant changes section 126 would produce. The results will be inefficiency in the court system, and unnecessary unfairness to defendants. It will interfere especially with the discretion of the Federal courts to manage CERCLA cases in the most efficient and equitable manner, it will increase duplicative litigation, and it will impose unjustifiable and unfair costs and burdens on those the government singles out to sue first.

1. Section 126 should encourage apportionment of liability. We share with the EPA and with members of this Committee the conviction that wasteful and costly CERCLA litigation must be reduced and that voluntary cleanup must be expedited.

To accomplish this result, courts must continue to have the authority conferred by Federal Rules 14, 19, and 20 to bring appropriate parties into the case in chief. Moreover, we believe that the Federal courts should be encouraged, by this legislation, to apportion liability among PRPs on an equitable basis and in accordance with statutory criteria. We attach proposed legislative language to this end. We urge the Committee to make equitable apportionment of liability a major objective of the amendments to be enacted. Such equitable apportionment would be impossible under current section 126 because the courts would be unable to have all the relevant parties before them and would be left to adjudicate claims among only those parties that the governmental plaintiff selected to sue. This shift in the careful balance struck in the Federal Rules is unwise and unnecessary.

2. Section 126 increases litigation. By removing the threat that the court will apportion liability if the PRPs do not agree among themselves, section 126 eliminates one of the most critical incentives for PRPs to apportion liability among themselves. In particular non-defendant PRPs will have very little incentive to settle promptly, if at all, knowing that it may be many years before the issues of defendant liability and level and manner of cleanup -- all of which must be resolved -- are the subject of settlement or judgment in the case in chief.

Thus, the natural consequence of prohibiting contribution claims in the case in chief is that all the issues litigated in that case will have to be relitigated in later contribution actions against non-defendant PRPs. The costs to the parties and the burden on the courts will double with no commensurate public benefit.

It is asserted by some that bringing many PRPs before the court in one action would cause delay. In fact, in most instances, the government's own feasibility studies on cleanup lag far behind efforts to settle the case or to move it to judgment. Delay of cleanup is rare, even in those cases in which there is a multiplicity of parties. The vast majority of sites at which litigation is anticipated involve a relatively small number of PRPs (20 or less). And, in those few instances where the joinder of multiple parties would actually cause delay, the courts under existing Federal Rules have ample authority to limit joinder or to sever trials to the extent necessary to protect the public interest.

Section 126 also authorizes the government to seek relief from nonsettling parties where less than complete relief was obtained from the settling parties. We believe that the government should be required to seek such relief from identifiable and solvent PRPs. A great many settling parties have felt that the government has not adequately invoked its enforcement powers upon nonsettlers; this has created a significant disincentive to some parties considering settlement. While the United States currently has prosecutorial discretion not to pursue nonsettling parties, as a practical matter, if they do not, the incentive to settle is lost.

Finally, an issue related to contribution and the incentive to settle is whether Fund money shall be used to pay for "orphan shares" at sites where no responsible and solvent party can be identified as being responsible for a given portion of the hazardous material (usually most evident after an apportionment of liability among PRPs). Implementation of an orphan share policy, where the Fund pays an orphan share and identifiable parties pay a substantial portion of cleanup costs, would promote settlement and encourage voluntary cleanup efforts. This concept should be reflected in legislation.

2. Section 126 is unfair to the PRPs singled out to be sued. Because a PRP defendant must wait so long and

sustain so many expenses before seeking contribution under section 126, the section creates a situation in which the government is most likely to sue the deep pocket defendants while ignoring less solvent, but possibly more responsible parties whose resources might not be sufficient to pay for cleanup. In addition to bearing the cost of litigation -- and possibly cleanup -- without contribution, section 126 works a further injustice on those sued by the government. It will be more expensive and difficult for the defendant PRPs to get discovery against non-defendant PRPs than it would be if the non-parties could be brought into the original suit by third party complaint. The very nature of such a belated contribution action under section 126 places a premium on defendant delay, in part because the defendants can unfairly use the ongoing financial burden on the plaintiff (having already incurred liability) as a litigation tool.

Section 126 also unfairly discriminates against non-government PRPs. Because the government will not sue itself and because those who are sued cannot cross-complain against government PRPs, section 126 ensures that judgment will never be entered in the first instance against the government.

Finally, even to the extent section 126 permits contribution actions, it unfairly limits those against whom the action may be brought. Section 126 limits the right to bring a contribution action in Federal court to persons liable under section 107(a). The provision excludes, therefore, potentially liable persons who are not generators, transporters, or disposers. We believe that this limitation on the right to seek contribution should be removed.

3. The language of section 126 must be further defined and modified. Chevron supports the concept of protecting settling parties from contribution claims where

matters were settled in "good faith." However, we believe that a definition of good faith should be included in this section because various tests have been used to ascertain whether a settlement was made in good faith. The absence of Congressional specificity on this point could lead to considerable non-uniformity and unfairness for settling parties and could ultimately undermine the incentives to settle. Most importantly, a good faith settlement should not preclude full equitable indemnity or contractual indemnity actions.

Section 126 provides that good faith settlements reduce the potential liability of others to the extent of any amount stipulated by the settlement, apparently contemplating only money settlements. In fact, many settlements call for the performance of work. The language of section 126 should be revised to state that potential liability of nonsettling parties is also reduced by the work agreed to be performed.

C. Citizen suits.

Section 138 would add a new section to CERCLA authorizing private citizens to bring a civil action against any person alleged to be in violation of CERCLA or against the government to compel performance of any nondiscretionary act or duty under CERCLA. However, no district court would have jurisdiction to review any challenges to response actions selected under section 104 or to review any order issued under section 106(a).

Citizens would have to give 90 days prior notice to the government and to any alleged violator. No citizen suit could be commenced if the government is "diligently prosecuting" an action under CERCLA or the Resource Conservation and Recovery Act ("RCRA") to require compliance.

Under section 138, any person could intervene as a matter of right in any government action commenced under CERCLA or RCRA when the applicant claims an interest relating to the subject of the action and is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest. Intervention would not be allowed, however, if the government showed that the applicant's interest is adequately represented by existing parties. The government would be allowed to intervene in any action under the provision without restriction.

Courts would be allowed to award the cost of litigation, including reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party.

Comments.

Section 138 citizen suits would be enormously disruptive of CERCLA proceedings and would delay and discourage private cleanup efforts.* Moreover, it unnecessarily interferes with the discretion of the Federal courts to ensure that all interests are adequately represented.

Chevron is particularly concerned about the potential impact of CERCLA on voluntary cleanups. As we have previously noted, the standards of the NCP, which must be applied in such cleanups, are applied differently in different situations. Each and every cleanup may therefore become the subject of a citizen suit questioning whether the NCP standards have been properly applied and whether, as applied, they achieve the correct result. The EPA has recently taken several steps to encourage PRPs to apply the

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* The significant disadvantages of citizen suits have been discussed (along with certain potential positive benefits) in a recent draft study commissioned by the Administrative Conference (Boyer and Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law, March 1985).

NCP standards privately and voluntarily. But the threat of citizen suits would substantially, if not totally, discourage voluntary action. It may cause parties to refuse to move forward without EPA involvement in every cleanup case so as to be able to assert that the EPA is "diligently prosecuting the matter." Such citizen suits, where filed, would not only undermine the prospects for voluntary action, but would divert private and agency resources from the actual cleanup efforts themselves.

We further believe that citizen suit authority is inappropriate in a remedial statute such as CERCLA because it would require the court, as the forum of first impression, to resolve highly complex factual and technical questions concerning the appropriateness of remedial action and the relative priorities of sites. It is precisely these types of issues that should be explored and decided in the first instance by the EPA and then reviewed by the courts.

We note that the citizen suit provisions would apply to the Victim Assistance Demonstration Program (section 129) which is by definition an experimental, though arguably non-discretionary, program. We strongly oppose the section 129 program in its entirety. However, if Congress chooses to go forward with the program, it must recognize that the program cannot achieve its purported experimental purpose unless the government has discretion and flexibility in choosing demonstration sites. This is particularly true in light of the extraordinarily emotional issues involved. Citizen suits would destroy that flexibility and ultimately force the courts -- not the EPA -- to determinate which sites are selected and how the program is to be implemented.

Section 138, like other sections addressed in these comments, alters the Federal Rules without reason or benefit. Under Federal Rule 24(a), a party seeking to intervene has the burden of demonstrating that all conditions for intervention are met, including the requirement that the intervenor's interest is not adequately represented by the other parties (Petrol Stops Northwest v. Continental Oil Co. (9 Cir. 1981) 647 F.2d 1005). Section 138 would shift to the government the burden of establishing the adequacy of representation, thus making it far easier for a party to intervene under the citizen suit provisions than under the Federal rules. This could lead to an unwarranted complication of CERCLA litigation.

If Congress elects to deal with citizen suits at all, it should authorize permissive intervention as mandated under the Federal Rules and should not authorize intervention as of right. The adoption of permissive intervention would allow the Federal courts discretion to permit intervention on a case-by-case basis. Under Federal Rule 24(b), anyone may be permitted to intervene in an action when the applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court would also be able to consider whether the intervention would unduly delay the litigation.

In sum, we do not believe that a citizen suit provision is appropriate or necessary in CERCLA, particularly as now provided for in section 138. We urge the deletion of section 138 in its entirety.

D. Judicial review.

Summary of Bill.

Proposed section 132 provides that review of any regulation promulgated under CERCLA may be sought in the District of Columbia Circuit Court of Appeals or in any United States Court of Appeals for a circuit in which the applicant for review transacts business directly affected by such regulation. Any review application must be made within

120 days from the date of promulgation of the regulation, unless the application is based solely on grounds which arose after the 120-day period.

Further, any matter for which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

Comments.

Chevron believes that for the most part section 132 moves in the right direction. We are concerned, however, about the limitation on judicial review underlined above. In some instances, the meaning of a regulation is determined by its application to a real situation -- there can be no meaningful challenge in the abstract. This is particularly true of the vast multitude of regulations which make up the NCP. Many of these are in the nature of "how to" regulations which set out procedures and standards to be applied to define the proper cleanup level and method in each individual situation. Section 132 should be revised to permit judicial review of the application of the NCP in an enforcement proceeding or in an action to obtain damages or recover response costs. We particularly question whether it is constitutional to hold a party criminally liable based on generic standards such as those in the NCP if these standards cannot be challenged in the course of the prosecution.

APPORTIONMENT

OPTION ONE

(Insert as subsection 107(c) and redesignate
other subsections)

(c) APPORTIONMENT.

(1) In any action brought under this Act, a court shall apply its equitable powers and shall apportion liability among potentially responsible parties. Such apportionment should be based on the following factors to the maximum extent feasible:

(A) the ability of the parties to demonstrate that their respective contributions to a discharge, release, or disposal of a hazardous substance can be distinguished;

(B) the relevant amount of each party's hazardous substance;

(C) the relevant degree of toxicity of each party's hazardous substance;

(D) the relevant degree of respective involvement by each party in the generation, transportation, treatment, storage, or disposal of the hazardous substance;

(E) the degree of care exercised by each party with respect to the hazardous substance concerned, taking into account the characteristics of such hazardous substance;

(F) the degree of cooperation by each party with Federal, State, or local officials to prevent any harm to the public health or the environment; and

(G) other reasonable equitable considerations deemed appropriate in light of the nature of the discharge, release, disposal, or response or remedial action involved.

(2) Nothing in this section shall affect the right under subsection 107(a) to recover costs of response from any person whose liability has not been apportioned under this subsection.

OPTION TWO

(Insert as subsection 107(c) and redesignate other subsections)

(c) APPORTIONMENT.

(1) In any action brought under this Act, a court shall apply its equitable powers and shall apportion liability among potentially responsible parties. Such apportionment should be based on the following factors to the maximum extent feasible:

(A) the ability of the parties to demonstrate that their respective contributions to a discharge, release, or disposal of a hazardous substance can be distinguished;

(B) the relevant amount of each party's hazardous substance;

(C) the relevant degree of toxicity of each party's hazardous substance;

(D) the relevant degree of respective involvement by each party in the generation, transportation, treatment, storage, or disposal of the hazardous substance;

(E) the degree of care exercised by each party with respect to the hazardous substance concerned, taking into account the characteristics of such hazardous substance;

(F) the degree of cooperation by each party with Federal, State, or local officials to prevent any harm to the public health or the environment; and

(G) other reasonable equitable considerations deemed appropriate in light of the nature of the discharge, release, disposal, or response or remedial action involved.

(2) In any action brought under subsection 107(a) in which apportionment of liability is made, the Hazardous Substance Response Trust Fund shall be used to pay any part of the claim amount that is apportioned or apportionable to responsible persons who have not yet been identified or who have been identified but are insolvent.

(3) Nothing in this section shall affect the right under subsection 107(a) to recover costs of response from any person whose liability has not been apportioned under this subsection.

Senator SPECTER. I would like to turn now to Mr. Randy Mott, National Association of Manufacturers.

STATEMENT OF RANDY M. MOTT

Mr. MOTT. Thank you, Senator. By way of personal introduction I am a partner in a Washington, DC, law firm and have been involved in hazardous waste litigation since 1978, not the same case, although some are still pending from then, and in total, I think right now probably over 100 cases involving hazardous waste sites in over 40 States.

I have been chairman of the Practicing Law Institute Hazardous Waste Litigation Conference the 4 years since its inception and have been on the Congressional Office of Technology Assessment Advisory Committees on RCRA and Superfund.

NAM I believe needs no introduction but is a business association of more than 13,000 businesses, 9,000 of which are small manufacturing firms with less than 500 employees.

Personally, I come to this problem—the written statement for NAM has been submitted and is available. As a personal note I come to the problem with some frustration, being a lawyer imminently involved in many cases from the very beginning, even before Superfund was enacted.

I have tried to do for my clients what I think Congress and the public expected which was to try to achieve prompt cleanup of sites by settlements or unilateral actions by the companies to fix things, or whatever we could do reasonably and promptly, that was necessary to limit the business client's continued liability and protect the public.

Cases I have been involved with have involved the replacement of water supplies, both local wells and whole community municipal systems; the act of pumping and treatment of ground water; voluntary removal of waste from a site. Even in one case the thermal destruction by incineration in a licensed incinerator of a significant amount of waste.

Generally a problem I have had in this, and I will get to the NAM position, but with this introduction, is I have literally had cases where I have walked into the agencies, practically speaking with a checkbook in hand trying to settle these matters, and it cannot get done.

And my frustration has been a frustration of many companies and their outside counsel which is an effort to try to get remedial action done, which is in I believe generally a client's interest, and to do so with the lowest possible transaction cost, particularly where those transaction costs include legal fees or consultant's fees that do not deliberately in and of themselves clean up anything or protect anybody.

We ask a very hard question, which was, what went wrong since 1980, where Congress envisioned I believe Superfund being a revolving fund that would be a safety net, and that the overwhelming amount of cleanups would be done voluntarily by the business community and that the fund would be, given its size, able to catch the sites where they were truly orphaned, where there was no party, or to fine-tune or supplement private efforts as necessary.

What stops more massive private cleanup effort and how can it be fixed? NAM's working group on this identified several things and I will summarize them very, very briefly.

The first is the current Government policy on remedial investigations and feasibilty studies. We believe that if companies agree to fund the studies and to do so consistent with EPA's regulations, and consistent with a current draft manual EPA has on protocols for doing those studies, that there should be no restrictions on that. It should be encouraged. It is not currently the policy of EPA.

Second, we believe that all potentially responsible parties that are identifiable with a good faith and reasonable effort should be notified immediately, as soon as possible in the beginning of these sites, and that such a process would obviously encourage the formation of groups of so-called PRP's, who could then agree to conduct the studies or do the remedial work or take the necessary action.

It is inconceivable that a system that does not identify and notify parties is going to lead to voluntary action by those parties on a timely basis. Third, we believe that consent decrees should incorporate generally a provision that technical disputes over the extent of remedy or the problem should be resolved on an evenhanded basis.

The party with the preponderance of the evidence should prevail. Provisions now routinely sought in consent decrees are to the effect that EPA is always right, that the Defendant will do whatever EPA says.

I have talked to some distinguished Members of Congress and their staffs who certainly would never stipulate that EPA, however good its current leadership, is always right.

I know friends in the citizen groups who represent the people living next to these dumps, who would never agree EPA is always right.

But industry, when it is funding a cleanup, is asked to stipulate in advance that EPA is always right and it will do whatever EPA says.

I think that belies common sense and it also certainly does not encourage a whole lot of cleanup. People will not generally sign such agreements.

Fourth, we believe that public participation should be more fulsome. That the full record of EPA data and technical reports should be made available to the public, the companies, and the residents in the sites. There should be more extensive opportunity for comment on the EPA studies and more extensive public proceedings. The one or two nights a year maybe that are devoted by EPA to community participation by the companies and the residents are woefully inadequate. We believe there should be judicial review of these decisions, particularly as to remedial actions that are long term, consistent with the Administrative Procedures Act, and we see no reason why actions should be exempt from the Administrative Procedures Act.

In particular, in response to questions from the Senators on Friday, I want to note that judicial review could simply involve declaratory relief with no injunction being sought or granted at all, stopping EPA from going forward, and it is my opinion, and I would be happy to answer questions on it, that there is invariably adequate time for declaratory relief to be considered before EPA actually turns the bulldozers loose.

We also support more extensive provisions in the statute——

Senator SPECTER. Are you close to being finished, Mr. Mott?

Mr. MOTT. Yes; thank you. We support contribution protection that would allow particularly de minimus generators, to settle and be done with it, and not be dragged back through litigation, and we also support the notion that a company should be allowed to pay more than its share if it wants to do the cleanup, or fund more, and manage the cleanup and have the right to sue others later for that excess that it paid. Last, we believe in a trial of these matters, it is an important policy for Congress to establish, that the trial of the remedy should be first with the trial of the liability second, and the reasons for that are obviously to encourage settlement.

Until you have a defined remedy, nobody is going to agree to sign a blank check.

I would be happy to answer questions later on any of these points, and in closing let me say that not only is more language needed to achieve what I think is a very moderate shift here in policy and in law, but actually, S. 51 in many cases makes the situation worse, and I would be happy to answer questions about that later.

Senator SPECTER. Thank you, Mr. Mott.

[The statement follows:]

TESTIMONY OF
RANDY M. MOTT, ESQUIRE
ON BEHALF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, Members of the Committee, I am Randy M. Mott, a partner in the Washington law firm of Heron, Burchette, Ruckert & Rothwell. By way of personal introduction, I have served for four years as chairman of the Practising Law Institute Conference on Hazardous Waste Litigation and I recently served on the Advisory Committee for the Congressional Office of Technology Assessment report on Superfund Strategy. I have been involved in almost one hundred hazardous waste cases over the last seven years in over 40 states. I have represented clients in more than forty sites on the Superfund National Priority List. I am testifying before you today on behalf of the National Association of Manufacturers.

NAM is a voluntary business association of more than 13,000 corporations, large and small, located in every state. NAM membership ranges in size from very large firms to more than 9,000 small manufacturing firms with less than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce over 80 percent of the Nation's goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

NAM members have a strong interest in the effectiveness of Superfund and support its reauthorization. We appreciate this opportunity to testify and this Committee's interest in assuring that strong, workable legislation be reported out to the full Senate.

Overview

The current liability scheme of Superfund is a combination of statutory provisions, case law and settlement policy. Ironically, this scheme may be a significant factor inhibiting greater private sector voluntary participation in remedial actions at Superfund sites. This scheme may also be responsible for the significant transaction costs incurred by government, public and private parties.

The NAM supports EPA's need and capability to respond to emergency situations at Superfund sites without procedural impairments. The National Contingency Plan provides for expeditious emergency action by EPA when necessary to protect public health and the environment. Enjoining or restricting EPA's ability to respond to imminent threats under section 106 is not an issue.

Most EPA remedial actions are long term by definition. They are undertaken after emergency action has been completed. Remedial actions are defined by the Remedial Investigation - Feasibility Study (RI/FS) process that may take 36 to 48 months to complete. The RI/FS process is deliberate, not immediate and is immensely complex in nature. It is the Superfund liability scheme associated with the RI/FS process and implementation of the remedy that is at issue.

The number of abandoned hazardous waste sites that will require remedial actions to protect public health and the environment has been estimated by EPA to exceed 2,000. Some estimates of sites that will ultimately be added to the National Priority List (NPL) are much larger. Additionally, non-NPL sites may also require remedial action. Given the large total number of sites that may be addressed by the Superfund program, progress in completing remedial actions will be enhanced by incentives for, and the elimination of obstacles to, greater private sector participation.

There have been estimates that transaction costs, including consultant and attorney fees, generated by Superfund could exceed $5 billion by 1990. Certainly, transaction costs have been found to be exceedingly high - sometimes greater at specific sites than the cost of cleanup. Any effort to reduce transaction costs would enable the Superfund program to be conducted in a more cost-effective manner and would provide incentives for early settlement and greater private sector participation. As the Congressional Office of Technology

Assessment noted, the problem is sufficiently complex that increased funding levels alone will not assure prompt or even significant progress in addressing the site inventory. With the addition of new sites to EPA's inventory at a rate faster than EPA-conducted remedial actions, it is obvious that private parties must play a greater role in hazardous waste remedial efforts. No reasonable level of funding or staff support will enable EPA to address the number of sites the public now expects to be managed.

Recommendations

NAM supports modest modifications to the current Superfund liability scheme to facilitate private sector involvement and to reduce transaction costs. These changes, combined with full public disclosure and participation, should expedite long term remedial actions and reduce costs. Modifications supported by NAM do not significantly change the liability provisions of current Superfund law but rather fine tune those provisions to eliminate obstacles and provide incentives for early settlement by potentially responsible parties.

Specifically, NAM supports the following modifications to the current liability scheme of Superfund:

o PUBLIC PARTICIPATION -- The public, especially the affected community and potentially responsible parties, has a need to know all relevant facts concerning the identification, investigation, and remedy for a Superfund site. Meaningful public hearings with adequate comment periods, publication in local newspapers and other reasonable means should be undertaken to keep the public informed and involved in specific Superfund site developments. EPA should have the statutory responsbility to encourage full public participation. Reports and data used by EPA should be on the record and published or at least available to all affected interests for review and possible challenge.

Too often public participation has been a cursory exercise, designed to justify a decision already made before meaningful outside input. See OTA, Superfund Strategy (April 1985). S. 51 would restrict public participation in administrative deliberations by too narrowly defining EPA's legal obligation to provide for it.

NAM believes a statutory requirement strengthening public participation is necessary to assure public acceptance of the process and higher quality technical decisions. In addition, S. 51 may unconstitutionally prohibit judicial review of EPA decisions in non-emergency situations, where the Administrative Procedure Act and established due process law would require a meaningful opportunity for review. The need for sound remedial decisions certainly justifies this judicial oversight function as well.

o POTENTIALLY RESPONSIBLE PARTIES (PRPs) -- EPA should be required by statute to make a good faith effort to identify all PRPs. All PRPs, once identified, should be formally notified by EPA. Supplementing the individual EPA notice to all PRPs, the full list of PRPs should be published and provided to all other PRPs. As new PRPs are identified, EPA should formally notify them and the other PRPs. Where EPA has notified a PRP, that PRP should be given an opportunity to examine documents in EPA's possession relative to that PRP's involvement at the site.

The basis for the involvement of PRPs has been section 104(a) which was construed in the legislative history of CERCLA to preclude the President from using the Fund, if private parties will take "proper action" at the site. S. 51 amends section 104(a) to allow the President to ignore the availability or willingness of private parties to act. This provision will significantly inhibit voluntary cleanup.

Rather than eliminate the requirement of notifying PRPs and considering their remedial plans, the statute should be amended to require that the President determine whether potentially responsible parties will take proper action. If private parties cannot be identified after reasonable effort, or if they do not agree to perform the necessary work, the President has the authority to use the Fund.

o TRIAL BIFURCATION/ORDER OF PROOF -- The order of proof in Superfund litigation can affect transaction costs and the viability of out of court settlement. Where litigation is required, EPA should settle issues concerning the remedy first, before adjudication of liability. PRPs are naturally reluctant to settle on liability before the remedy is identified and costs are estimated. Further, PRPs are less likely to make an issue of liability if remedial costs are known and their share of the costs can be estimated.

NAM believes that Congress should express a clear intent that trial of these complex cases should first commence with the remedy in the interest of judicial economy, voluntary settlements and expedited site cleanup.

o DISPUTE RESOLUTION -- A major obstacle to settlement is EPA's refusal to incorporate acceptable dispute resolution provisions in consent decrees. An expedited mechanism to resolve disputes under consent decrees is needed. Disputed issues should be resolved by the preponderance of the evidence. It is not desirable for EPA to insist on an "EPA is always right" or an "EPA's decision is final" clause to be included in Superfund settlements. In fact, EPA is not always right and affected interests may not agree with EPA. Local government, the public and private parties should have the ability to raise issues and have their positions considered in any dispute with EPA. The issues should be decided in U.S. District Court by a preponderance of the evidence.

NAM believes a key to effective case management of the hundreds of cases pending in this area is the provision of an early stipulated settlement, pending the full definition of the problems at a site and their solution. Early Department of

Justice decrees allowed parties to agree to evaluate the problem and potential remedies and report to EPA and the court. Disputes, if any, would be resolved by the court on the basis of the evidence presented by the parties. This practice focused the parties' resources on solving the problem and limited disputes to those that were legitimate questions on the technical issues at the site.

The current practice of the Agency is to seek, or even insist, on dispute clauses that presume EPA's technical decisions are correct or that limit judicial review of consent decree disputes to a narrow standard, such as "arbitrary and capricious." This approach has been an enormous deterrent to settlement agreements.

NAM believes that an even-handed dispute resolution clause should be required in consent decrees for technical disagreements concerning the evidence. This provision would create a new category of cases that could be resolved quickly and with lower transaction costs.

o REMEDIAL INVESTIGATION/FEASIBILITY STUDY (RI/FS) -- Private parties should be encouraged to perform the RI/FS without requiring, as a prerequisite, a commitment to implement the remedy selected by EPA. The RI/FS identifies problems at a specific Superfund site and the remedy to resolve those problems. PRPs should have an incentive to perform RI/FSs consistent with the National Contingency Plan and the EPA RI/FS Manual, thereby providing quality assurance with EPA protocols. Currently, EPA normally insists that the PRP commit to the remedy EPA selects as a precondition for a PRP to prepare the RI/FS. By encouraging and unleashing private sector resources, many more sites can be addressed and more RI/FSs undertaken than will be the case if all are done by EPA. Also, where PRPs conduct the studies, they are more likely to agree to the selected remedy. Again, all aspects of a privately conducted RI/FS should, to the extent feasible, be subjected to EPA initial, interim and final approval.

Requiring initial agreement to the final remedy destroys the incentive for PRP cooperation.

o CONTRIBUTION -- The Superfund statute is silent and case law is mixed on the question of contribution. The right of one liable party to seek reimbursement from another is not defined under current Superfund law. This uncertainty inhibits early PRP settlement and should be reduced to provide an incentive for constructive participation. PRPs should be allowed to elect a fair-share settlement and be protected from future third-party suits by PRPs who are not a part of the initial settlement. This can be done by adopting provisions similar to those of the Uniform Contribution Among Joint Tortfeasors Act. PRPs, who settle for more than their fair share of remedial costs to facilitate settlement, should be allowed to initiate third-party suits under Superfund against non-settling PRPs to recoup that portion of the remedial costs exceeding their fair share. There should be no restrictions on this type of third-party suit.

Contribution is especially important for de minimis generators. They need an opportunity to settle at the earliest possible time. De minimis generators cannot justify transaction costs that normally would exceed their fair share of remedial costs. Special consideration should be given to de minimis generators so that they can quickly discharge their financial responsibilities at a specific site without the need for full representation or participation in all settlement and remedial activities at the site.

NAM recognizes that hazardous waste generators have a responsibility to ensure that the disposal of their wastes pose no significant threat to human health or the environment. Nevertheless, the current liability scheme of Superfund erects obstacles to and inhibits voluntary private sector participation in remedial actions at Superfund sites. These obstacles can be reduced and incentives provided by adoption of the points noted above. Accordingly, NAM urges the Committee to consider and adopt these modest modifications.

APPENDIX

Although the subject of "victim assistance" was not encompassed in the Unanimous Consent Agreement, NAM believes it should attach comments on this subject as an Appendix to the preceding testimony.

Section 129 of S. 51 is entitled "Victim Assistance Demonstration Program." This section outlines a program whereby, on the basis of studies by the Agency for Toxic Substances and Disease Registry, certain areas would be singled out for preferential treatment, including free group medical insurance policies. S. 51 contemplated that this progam would be financed from general revenues in the amount of $30 million.

However, S. 51 was re-referred to the Senate Finance Committee, which decided to fund the bill through a continuation of the feedstock tax and adoption of an excise tax without resort to general revenues. This leaves the Section 129 program with no visible means of support. However, it is entirely possible that an amendment may be offered on the Senate floor to restore funding for Section 129. NAM believes any such proposal would be unfortunate, and urges the members of the Senate Judiciary Committee to oppose any effort along this line and to support deletion of Section 129.

The "victim assistance demonstration program" is unwise as health care policy, as budgetary policy, and as environmental policy.

The proposed victims assistance demonstration program is misdirected as a health care initiative. There has been no demonstration that there exists a widespread pattern of significant chronic illness caused by exposure to hazardous waste disposal sites. Neither has it been demonstrateed that any such illnesses or injuries that may arise have not been and cannot in the future be compensated appropriately through traditional liability. Indeed, the principal effect of the proposed victims assistance program would be precisely to circumvent traditional standards of liability in order to establish a new, ill-defined, open ended medical entitlement program based on need, not on a demonstration of waste generators' responsibility. This, in turn, is proposed entirely without reference to this country's elaborate and enormously expensive safety net, including tax subsidies for private health insurance, disability insurance and Medicare under the Social Security System, Medicaid, and workers' compensation. Unless and until this safety net is demonstrated to be insufficient, the creation of new entitlements should be resisted. The haphazard creation of new medical entitlements, on an "experimental" basis, promises to further complicate a national health care policy already generally conceded to be badly in need of rationalization and is thus unwise on its own merits as well as inappropriate in the context of Superfund.

The budgetary implications of the proposed demonstration program are equally ill considered. Although the program is initially authorized as $30 million, it is difficult to believe that it could in fact be confined to that level. It seems probable that a limited "demonstration" program would, in short order, balloon into a full scale, perpetual, fifty state entitlement. The black lung program was established in 1969 to comnpensate coal miners for a single disease and, on the basis of exhaustive study, was projected as a "one shot" program to terminate in 1976 at an estimated total cost of $350 million. By 1981, the program was paying benefits to some 460,000 individuals, more than twice the number of coal miners employed at the time; by that date, beneficiaries had received $11.5 billion in benefits, more than 30 times the initial cost projection. The black lung standards of entitlement are a model of rigor compared with the standards proposed for the toxic victims compensation "demonstration" program.

NAM would respectfully urge--in the absence of any demonstration either of widespread health risks associated with hazardous waste sites or of an incapacity of current health programs and tort law to address any such illnesses, and in the presence of federal budget deficits nearing $200 billion annually-- that the Congress not gratuitously expose the federal government to yet another open ended entitlement program.

Finally, a "victim assistance" program, as proposed by S. 51, is counterproductive as environmental policy. Its effect would be chiefly to divert needed Superfund resources from waste site cleanups, with ancillary effects which, as noted earlier, would be generally inimical to sound health and budgetary policy. EPA has estimated that the number of NPL sites could grow to between 1,500-2,000, and other estimates range considerably higher. Siphoning substantial funding from cleanup efforts, in order to finance other objectives of--at best--debatable values can only impede completion of Superfund's mission.

NAM respectfully submits that if Congress believes that there is need to proceed to a compensation program for toxic injuries, the great majority of which are unlikely to be associated with Superfund sites, it should have adequate hearings, on this issue. Further, we believe that if such a program be proposed it should be considered on its own merits, and not as a part of Superfund legislation.

Senator SPECTER. Thank you, Mr. Martin. I would like to turn now to Mr. Edmund Frost representing the Chemical Manufacturers Association. Mr. Frost.

STATEMENT OF EDMUND FROST

Mr. FROST. Senator Specter, it is an honor to be invited to testify today. I am with the law firm of Kirkland and Ellis where my practice in the past 3 years has been primarily Superfund litigation. I am appearing today on behalf of the Chemical Manufacturers Association in support of their written testimony which you have already received, and I request that it be included in the record.

Senator SPECTER. It will be made a part of the record in full.

Mr. FROST. I bring a perspective of a lawyer who has worked in the trenches on two major multiparty Superfund cases, *Conservation Chemical* and *Chem-Dyne.* It is my hope that this perspective will help the committee to determine how to make sure that the Superfund program is expeditious, efficient, and well managed. This is a goal which CMA and I share; voluntary cleanup is essential to accomplishing this goal.

There are two things this committee should do to encourage voluntary cleanup. The first is to make sure that Superfund provides a reasonable right of contribution, and the second is to provide funding for orphan shares. Regarding contribution, S. 51 should provide a statutory right of contribution, provide statutory protection for good faith settlers, and most important, it should leave case management where it is under the present Federal rules; that is, with the judiciary.

The original Justice Department proposal which is now in S. 51 would have banned contribution actions until after judgment against the original defendants. The Justice Department retreated from this position Friday; nevertheless, their fallback substitute is still unsatisfactory. It would still deprive the judge of the discretion to manage his case.

Senator SPECTER. How do you know what their fallback position is? What is their fallback position?

Mr. FROST. Their fallback position is that the parties could bring their contribution actions at any time but that the apportionment would be stayed and would not be heard until after the Government's case against the original defendants had been completed. So they would push contribution back to a second phase. This position was attached to their testimony.

The *Conservation Chemical* case in Kansas City provides an example of how the new Justice Department fallback proposal would work to deter settlement.

In that case settlement talks with the third parties looked promising until the court did what the Justice Department proposes. The court split or bifurcated the case to postpone allocation for third party liability until a second, later phase of the proceeding. The third parties' incentive to negotiate disappeared and they walked away from the settlement process at that time. As a result, *Conservation Chemical* has been one of the longest and most difficult multiparty cases to settle.

In contrast, *Chem-Dyne*, the other multiparty case I have worked on moved quickly toward a settlement as soon as Judge Rubin made absolutely clear to the third-party defendants that he was not going to split the case, to postpone their liability, and that, instead, he was going to hold all of the parties to a tough pretrial and trial schedule.

Judge Rubin's management plan would——

Senator SPECTER. Mr. Frost, on the procedure, if you have a plaintiff versus a defendant and the defendant then brings in a third-party defendant, the first part of the case would turn, would it not, on the plaintiff's claim against the defendant? Would that not be the normal sequence of events before taking up the claim of the defendant against the third-party defendant?

Mr. FROST. Not necessarily. The judge has discretion under the Federal rules, particularly rule 14 and rule 16 on pretrial orders, to arrange trial of the case so that it can be packaged to have the most efficient administration of justice. It would not make a lot of sense to litigate the liability issues regarding some parties now, and then have another set of issues, and then try the liability of other parties later.

Senator SPECTER. Well, I am not suggesting necessarily that you go to a verdict on the claim of plaintiff versus defendant before you start hearing evidence of defendant against a third-party defendant, but in the normal sequence of events, would not the plaintiff be expected to put on the case first as to the original defendant?

Mr. FROST. I would think so.

Senator SPECTER. Well, what precisely does the—when I was questioning on Friday, a representative of the Department of Justice, I did not understand precisely how the Government contemplated their change in procedures would work out. He did say there would be a change, but how do you understand that to be specified?

Mr. FROST. What I understand——

Senator SPECTER. You can have some more time——

Mr. FROST. I think that I ought to answer that one in writing, but what I undertsand is that they would want to complete their whole case against the original defendants, being liability and remedy, and if it was going to be a 106 order, get that order issued against the original defendant parties. Equitable contribution would be put off to a later phase of the case. So that the third parties would not be threatened with phase I liability, with the threat of having to write a check.

Mr. RENFREW. Senator, may I try and answer that question?

Senator SPECTER. Well, why don't we let Mr. Frost go ahead with his testimony. We will come back to this during the question period.

Mr. RENFREW. All right.

Mr. FROST. Well, Judge Rubin managed the *Chem-Dyne* case so that he held all the parties' feet to the fire in the original matter, and he refused to bifurcate it to let the third parties out to a later phase. This resulted in a very well-managed and sensible case.

Now it is my understanding that the ordering of the trial, which Judge Rubin contemplated would be forbidden by the Justice Department's fallback proposal. I think this is just foolishness, and that Congress should refuse to deny Federal judges the discretion to manage their own cases. The order of the trial ought to be a matter for the judge. The second thing necessary to encourage voluntary cleanup is to allow the fund to pick up the orphan share of absent or insolvent parties.

Lee Thomas made clear last Friday that EPA agreed with this policy but he said that he had to have congressional approval for EPA to fund orphan shares, and such approval should be expressed unequivocally in S. 51.

Proper management and oversight of the Superfund Program should also be addressed by the committee, and this should include both congressional as well as judicial oversight. Meaningful judifical oversight would be almost completely eliminated by S. 51.

The Judiciary Committee should focus on the fact that S. 51 presents real constitutional problems. It would deny any meaningful heairng on CERCLA administrative orders. This denial would clearly be an unconstitutional denial of due process unless some kind of special emergency was involved which could outweigh the due process right.

CERCLA cases are not always emergencies. Most of the Government orders do not involve an emergency at all because the Government interprets the imminent and substantial endangerment test as requiring only a risk of a risk.

In practice, there is almost always time for constitutional due process and some meaningful judicial oversight.

The Judiciary Committee should do two things to provide for proper judicial review and oversight. First, S. 51 should be amended to provide preenforcement and preexpenditure review, unless the Government can show that an emergency exists.

Second, S. 51 should be amended to insure that judicial review, when it takes place, is not so limited in scope as to be meaningless. Section 133 allows only an arbitrary and capricious, and contrary to law, standard of review. This should be changed to allow full review under Administrative Procedure Act standards.

Assistant Attorney General Habicht said last Friday at the hearing, that responsible parties did not need preexpenditure review because, in his words, "They get the same day in court at a later time."

He also said that the courts review the Government's costs to make sure that they are, quote, "lawful, reasonable and based on the administrative record."

Senator SPECTER. Mr. Frost, are you close to concluding your testimony?

Mr. FROST. Very close. This would not be true under S. 51 and present case law. Under this law, after the fact review would be virtually meaningless.

Instead, the committee should take Mr. Habicht at his word. The committee should amend S. 51 to afford parties a reasonable day in court. That is, it should provide for meaningful preenforcement and preexpenditure review except in emergency situations.

Without this kind of judicial oversight, Congress simply cannot expect the Superfund Program to be fair, efficient, and effective. Thank you very much.

[The statement follows:]

STATEMENT OF

EDMUND B. FROST, ESQ.

KIRKLAND & ELLIS

ON BEHALF OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

CMA supports an effective national program to clean up problem hazardous waste sites. It is committed to play a cooperative and constructive rule in the Superfund reauthorization process. Central to the cleanup program is an effective settlement and enforcement process. CMA proposes several suggestions to enhance private party involvement and several specific amendments to S.51 with respect to the settlement process. CMA recommends the following process:

- EPA should first identify all major responsible parties at a site and enter into negotiations with those who are willing to settle quickly.
- Next, EPA should use the Fund to pay for the remaining or orphan shares, that is, those who are either unwilling to settle or are not available for settlement.
- Lastly, EPA should vigorously pursue non-settling parties to recover the costs of the Fund acting on behalf of the recalcitrant parties.

To aid in implementing this approach, Congress should enact an explicit authorization of the use of Superfund for orphan shares.

With respect to specific provisions of S.51, CMA recommends the following:

Section 126 of S.51, should be amended. While explicitly recognizing the right of contribution under Superfund, it carves out such cases from operation under the Federal Rules of Civil Procedure. This aspect of S.51, while an unreasoned precedent for other types of cases to be exempted from the FRCP, will also result in prolonged litigation and will impede the settlement process. CMA does support that provision of S.51 that provides protection from contribution suits to parties that enter into good faith settlements.

Section 133 of S.51 should be amended to provide an effective right to a hearing to scrutinize EPA orders under Sections 104 and 106 of CERCLA. The current version of Section 133 states that no court shall have jurisdiction to review any challenge to the selection of a response action by EPA or to an administrative order issued by EPA except in a cost recovery or enforcement action. The emergency response needs of EPA can be balanced with the right to due process and a fair hearing in an amended version of this section.

Section 138 of CERCLA should be deleted. This section provides a right for citizens to sue in federal court and to intervene in governmental enforcement actions. Suits by citizens seeking to compel EPA to act and to change its cleanup and enforcement priorities will burden the courts and divert critical Agency resources from the cleanup program. Moreover, several of the provisions of Section 118 raise serious constitutional and policy issues.

The Chemical Manufacturers Association is a non-profit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in this country. In several appearances before Congressional committees since November of 1983, we have stressed both our strong support for an effective national program to clean up problem waste sites, and our commitment to play a cooperative and constructive role in the process leading to reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), more commonly known as Superfund. We are pleased to present our views on those aspects of Superfund reauthorization of concern to this Committee: the liability standard under CERCLA and its impact on the settlement process, the right of contribution, pre-enforcement review of certain EPA orders and citizen suits.

Before going on, CMA wishes to express its support for the fact that S.51 does not contain a federal cause of action for alleged victims of exposure to hazardous waste. We have stated that state laws are adequate to deal with such situations. We further understand that no amendments to S.51 will be offered to include such a cause of action. We therefore will not comment on it further at this time.

I. The Current Enforcement System Does Not Prevent Abuses of Discretion

CMA is committed to reauthorization of Superfund and to the prompt cleanup of inactive hazardous waste sites. Critical to achieving this goal is an effective settlement and enforcement process that will promote voluntary cleanup.

Primary among the reasons that this Committee has taken jurisdiction of Superfund reauthorization legislation is the concern that the existing Superfund enforcement and settlement process has not been effective in achieving the goal of cleaning up hazardous waste sites. That process has evolved through a combination of court decisions and EPA and Department of Justice (DOJ) policy pronouncements. The public statements of enforcement officials suggest that they are concerned that, due to the large number of potential parties in some Superfund cases, such litigation may become unwieldy. They seek, therefore, to expand their enforcement powers and discretion and to decrease the opportunities for potentially responsible parties ("PRPs") to seek judicial scrutiny of that discretion and to assert procedural and substantive defenses. The EPA and Department of Justice have sought to accomplish these goals through their enforcement policies and litigation as well as through certain amendments to Superfund, now part of S.51.

On the other side of the process, PRPs see the current system as being fraught with abuse and the proposed EPA/DOJ amendments as having the potential to make the process totally one-sided. Primary among the current abuses is the government's practice, under the theory of joint and several liability, of selecting which PRPs will be actual defendants or enforcement targets. Companies feel that their financial ability to pay, rather than their degree of responsibility at a site, will mark them as potential defendants. They point to the Conservation Chemical case as an example where the government has sued only a handful of PRPs out of several hundred identified as having a connection to the site. In other cases, the enforcement target's connection to the site has not been substantial.

Under the current system, some parties are reluctant to come forward for negotiations, perhaps chilled by the example of the Berlin and Farro site in Michigan, where ten parties, out of nearly 200 at the site, who had come forward to lead negotiations as a steering committee, became the targets of ex parte administrative orders to clean up the site when EPA apparently determined that negotiations were not proceeding at the desired pace. Yet another abuse is found where the flow of information, as in response to notice letters under §104, is one-sided, PRPs to EPA, rather than reciprocal. In several regions, EPA has refused to provide important information about the site to PRPs.

The result of these policies and actual enforcement activities is the perception among PRPs that the system is highly unfair, that it allows a company with one drum at a site possibly to bear the entire liability for cleanup, and that it allows a company that comes forward to negotiate to be singled out as an enforcement target. Moreover, PRPs protest they are faced with administrative orders issued without a meaningful opportunity to confer with the Agency and that they are forced to make decisions possibly leading to voluntary settlement or litigation without the benefit of critical information about the site.

It is not unreasonable to expect those who are the potential targets to desire to have more to rely on than the good-faith of the enforcement officials currently at the helm, when the system itself has many opportunities for abuse of discretion. This reliance is strained to a greater extent when the proposed amendments would further limit PRP rights and expand enforcement discretion.

Rather than dwell further on how the system does not work, CMA finds it more constructive to detail its proposals on how to make it work. In doing so, our overall theme is that incentives should be provided for voluntary settlement, rather than trying to achieve settlement by making litigation onerous and one-sided, the "carrot" rather than the "stick." We will give our comments about changes to the current system to promote settlement, followed by specific comments on portions of S.51.

II. The CERCLA Liability and Enforcement Scheme Should Provide Incentives for Voluntary Settlement

Under current law, the government has several enforcement vehicles to seek cleanup and to recover the costs of its cleanup activities. Rather than enforcement or litigation, however, the goal of expeditious cleanup is usually better served by a speedy and responsible settlement process. Several key components could speed the process and make the whole program more efficient. To achieve these goals, we recommend the following:

-EPA should first identify all major responsible parties at a site and enter into negotiations with those who are willing to settle quickly.

-Next, EPA should use the Fund to pay for the remaining or absent shares, e.g., those who are either unwilling to settle or are not available for settlement.

-Lastly, EPA should vigorously pursue non-settling parties to recover the costs of the Fund in acting on behalf of the recalcitrant parties.

We will consider each of these steps in greater detail below.

Private parties are seeking appropriate vehicles through which to channel their voluntary cleanup activities. As we said above, the problem they have confronted is that too often the government offers only "the stick" to make litigation unattractive rather than the "carrot" to make voluntary action attractive. Using the second approach, several ways are available to enhance private party involvement within the existing CERCLA liability scheme. In evaluating these suggestions, it should be kept in mind that experience has shown that for the most part, private parties are willing to pay their fair share of site cleanup costs. Consideration of this factor in evaluating various settlement proposals would do much to promote the likelihood of voluntary action and settlement.

Before elaborating on our views about liability and settlement, we would like to make two prefatory comments. The first concerns the recommendations of the Administrative Conference of the United States with regard to negotiated cleanups under CERCLA. We believe the proposals of the Administrative Conference offer sound principles for improving the settlement process. We concur with the Administrative Conference's assessment "that a properly designed site negotiation process, through which responsible parties or third parties would agree to act directly to clean up sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector."

According to these proposals, EPA should place greater emphasis on the negotiation of voluntary cleanups at hazardous waste sites. EPA is also encouraged to exercise greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. We will refer to specific recommendations in our testimony, such as the use of Fund money to pay for absent shares and apportioned liability based on the volume and nature of wastes at a site. We believe these recommendations deserve the support of Congress.

Our second comment concerns the EPA Settlement Policy for Superfund cases ("Interim CERCLA Settlement Policy," December 5, 1984). Overall, the policy has added substantial flexibility to the negotiation process, and as a result will likely promote settlements. The new policy should also enhance the likelihood of more rapid settlements because, if fully implemented, it will encourage parties to come forward with settlement offers earlier in the negotiation process and under a greater variety of circumstances.

One significant problem with the new policy, however, is its equivocation on a number of important issues. For example, at one point it indicates that the Fund can be used for orphan shares, while at others it indicates that parties would have to contribute greater than their proportionate share to cover the shares of non-contributing parties. The use of equivocal and inconsistent statements must be clarified if the government is to encourage settlements and conserve Superfund resources.

There have been indications that EPA has been unwilling to fully implement those aspects of the Settlement Policy giving EPA more flexibility in negotiations because of concern about Congressional oversight and criticism of such flexibility. For this reason, codification of certain portions of the policy, such as the authorization to use Fund money for orphan shares would eliminate this impediment to the negotiation of settlements under the policy. There are also indications that certain regional offices of EPA are not fully implementing Agency policy directives. This must also be corrected if the settlement process is to be improved.

As indicated above, the first step in an effective settlement process is for EPA to identify all major responsible parties at a site and enter into negotiations with those who are willing to settle. Responsible parties and the government share a common interest in avoiding the potentially burdensome transaction costs of litigation. It is in the interest of both groups, therefore, to identify responsible parties and to begin settlement negotiations at an early date.

There has been concern, however, that some regional offices of EPA have not been forthcoming in providing potentially responsible parties with necessary information regarding their alleged involvement at a site, even when the PRP has provided information in response to the notice letter under Section 104. The EPA Settlement Policy states that the Agency will release information concerning the site to PRPs to facilitate settlement discussions. To insure that this exchange of information occurs, Congress should amend CERCLA to provide that the EPA will make available to any party notified that it may be a responsible party, all documents indicating the quantity and nature of hazardous substances allegedly generated or transported to the site by that party as well as all documents, describing, assessing or evaluating conditions at the site and the nature and cost of proposed remedial action.

When Superfund was originally passed in 1980, the Congressional intent was that the Fund cover the cleanup of orphan sites where no responsible party could be identified. EPA has indicated that its experience in identifying candidate sites for cleanup as well as PRPs has shown that there are very few orphan sites. Instead, there are sites with identified PRPs and orphan shares, that is, some portion of the material contributed to the site with which no identifiable or financially viable responsible party can be associated.

There has been recognition from several sides of the Superfund debate that use of the Fund to pay for orphan shares would promote settlement. The Administrative Conference of the United States in its recommendations concerning negotiations under CERCLA urges the EPA to consider the advantages of greater flexibility in negotiations including the use of Superfund to pay the balance of cleanup costs where settling parties agree to pay less than 80 percent, or under the current Settlement Policy, a substantial portion of cleanup costs. [1/] In particular, Recommendation 9 notes that such a use of the Fund might be desirable "as an incentive for cooperating parties to join promptly in an agreement."

Experience in Superfund negotiations and litigation has shown that in most cases responsible parties are willing to pay their fair share of cleanup costs in an early settlement without litigation. An impediment to prompt settlement, however, is the requirement by EPA that those willing to settle also cover the orphan shares, and the shares of those unwilling to settle. This surcharge for orphan shares has become a major stumbling block to those willing to pay their fair share. As a result, settlements have not gone forward where the orphan share was significant. In those cases where EPA is seeking to compel PRPs to undertake cleanup (rather than a cost recovery action), use of the Fund to cover the orphan shares and the shares of those unwilling to settle would enhance settlement prospects and make money available up-front for site cleanup, thereby expediting the cleanup process. EPA officials have themselves indicated their belief that use of the Fund for orphan shares would promote settlement, but have also indicated that they are reluctant to do so without explicit Congressional approval. Congress should therefore explicitly authorize use of the Fund to cover these shares in order that cleanup may proceed as soon as possible.

Thereafter, as the third step in the process we outlined above, the Department of Justice should aggressively pursue the non-settlers, to recover expenditures from the Fund. The Administrative Conference, in its Recommendation 9, recommends such a procedure noting that "The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsibility, since agreements will free Agency resources to pursue the intransigent parties."

Another incentive for voluntary settlement would be to provide parties that settle with a meaningful release from liability. Among other aspects of releases, PRPs are particularly concerned about what has been called redisposal or secondary site liability. This situation arises where, as part of an agreement or as part of response action by the government, material from the Superfund site, site A, is disposed of, with EPA approval, at another site, site B. The issue is whether the responsible parties at site A will have liability for the same material at site B. If EPA or state officials approve the transport of material to site B and the use of that site, the responsible parties who have paid for the cleanup of site A should not have lingering, uncertain liability which may last far into the future and extend beyond site B to other sites as well. This aspect of the non-final release issue has been a stumbling block in several settlements.

We have referred several times to a party's "fair share" of cleanup costs. An incentive to settlement would be to apportion liability based on the volume and nature of wastes at a site. The Administrative Conference recommends this approach in appropriate cases. One basis for such apportionment are the "Gore Amendment" factors, part of the House version of the 1980 CERCLA bill, and which were viewed by the court in U.S. v. A&F Materials 578 F.Supp 1249 (S.D. Ill. 1984) as an appropriate alternative to a rigid application of joint and several liability. The court in A&F Materials listed these criteria:

> (i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
>
> (ii) the amount of the hazardous waste involved;

> (iii) the degree of toxicity of the hazardous waste involved;
>
> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
>
> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
>
> (vi) the degree of cooperation by the parties with Federal, state, or local officials to prevent any harm to the public health or the environment.

A & F Materials, 578 F.Supp at 1256. Use of these factors and the approach of the court in A & F Materials should be given serious consideration.

III. The Section 126 Provision on Contribution Will Modify Current Practice, Burden the Federal Courts, and Impair the Likelihood of Settlement

It is critical that responsible parties have a right of contribution under CERCLA. Under common law, a party is normally entitled to seek contribution from other liable parties where the party has been sued for more than his fair share of responsibility. While several court decisions have held that there is a right of contribution under CERCLA and the Department of Justice has taken that position in filed briefs, [2] we commend the explicit recognition of a right of contribution in S.51 to clearly settle the issue and to affirm its importance in the Superfund enforcement process.

Section 126 of S.51, however, provides that a contribution action is precluded until after judgment or a good faith settlement. Such a provision will have two important impacts. First, it would substantially modify normal practice under the Federal Rules of Civil Procedure, and change how cases are tried in the federal courts under CERCLA. As discussed below, such radical changes in court procedures appear imprudent and unnecessary. Second, Section 126 provision would have a substantial effect on the Superfund settlement and liability process as it will inhibit settlement and will place unfair burdens on responsible parties. Other means short of this legislative restriction of the right of contribution are available to accommodate the government's legitimate interest in the expeditious management of litigation. Each of these impacts will be examined below.

Specifically, Section 126 of S.51 would amend CERCLA by adding a subsection "1" to Section 107 which would provide, among other things that in any judicial or administrative proceedings under Sections 106 or 107, "no claim for contribution or indemnification may be brought until after entry of judgment or date of settlement in good faith." [3/] This provision is intended "to postpone counterclaims, cross-claims, and third-party action" (and have them tried as a separate suit where possible) until after the initial action. The provision's purpose is to permit the government to resolve its claims against potentially responsible parties prior to the court becoming involved in related claims. [4/]

Such a procedure, however, is contrary to the Federal Rules of Civil Procedure which are intended to establish a flexible framework within which judges can effectively manage third party complaints, joinder and other aspects of complex litigation. Rule 13 requires counterclaims arising out of the same transaction to be pursued, and permits any other counterclaim to be brought and tried, during the same action. Rule 14 explicitly permits a defendant to implead any person who may be liable to him "for all or part of the plaintiff's claim against him." Rule 19 requires that certain indispensable third parties be made part of an action or the action be dismissed. [5/] Rule 20 permits the joinder of any party asserting claims, or against whom claims are asserted, arising out of the same transaction or occurrences as the original claim. Rule 21 authorizes a federal judge "on motion of any party or of [his] own initiative" to add or drop parties on any terms as are just in any case before him. At the same time, Rule 42 and others give federal judges authority to try such parties separately or together, and to otherwise order the litigation as judicial economy, fairness or other considerations may require. [6/]

Section 126 of S.51 in effect would nullify or substantially modify the operation of these rules in CERCLA cases, denying defendants the benefits while at the same time limiting the tools available to federal district courts to manage their dockets. Moreover, the amendment would require multiple trials to deal with jointly liable parties under CERCLA, a procedure which runs directly counter to the original purposes for the third party practice rules and the trend of recent jurisprudence concerning joint and several liability.

The current rules involving joinder of parties were originally adopted to foster judicial economy. In adopting Rule 19, the Supreme Court Advisory Committee stated that "[w]henever feasible, the persons materially interested in the subject of an action . . . should be joined as parties also that they may be heard and complete disposition made." [7] Avoidance of multiple suits and the threat of inconsistent judgements were some of the fundamental purposes of the Rules. The Supreme Court has stated:

> Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. [8]

Likewise, recently drafted uniform laws of contribution and comparative fault contemplate that, even in cases of joint and several liability, determinations of relative liability will be made in the original action. [9]

This provision would have a negative impact on judicial economy in other ways as well. The preclusion of concurrent contribution actions in Section 126 could more than double the number of federal court cases that will be necessary to completely adjudicate a hazardous waste site. If several defendants were required to bring their contribution actions after trial of the initial action, they each would have several claims which would not necessarily be brought in the same jurisdiction as the original claim, and would not necessarily be tried together. Thus, many suits could result. Moreover, third party defendants, who cannot be parties to the government's main action under the Section 126 scheme, may seek to reopen issues decided in the first proceeding, such as the extent of remedy.

Section 126 would have an equally important effect on the settlement process. Coupled with the government's practice of suing less than all responsible parties at a site, it has the potential to significantly diminish the likelihood of settlement. Those parties sued by the government ("original defendants") face the prospect of liability for more than their fair share of cleanup costs, without the potential for early contribution from other responsible parties not sued by the government. Thus, the original defendants may have a greater incentive to litigate than to settle. The result of this proposal is that there will be fewer and slower, not more and quicker settlements. Those parties sued may also be reluctant to settle because of the likelihood that the non-sued parties would challenge the terms of the settlement in a subsequent contribution suit.

Moreover, the actuality of being brought into the litigation as a third-party defendant, concurrent with the original litigation, has the effect of bringing all such responsible parties and their financial resources to the bargaining table at an early date. These parties may also be subjected to the direction of the court in settlement negotiations. Under Section 126, an originally non-sued party, faced only with the possibility of a contribution action, possibly years in the future, may be less likely to join in an initial settlement effort if the likelihood of litigation is more distant.

The proposal's unfairness is manifested in another way. It places an unreasonable litigation cost burden on the original defendants, who first must defend the suit by the government on their own and either pay a settlement or judgment. They then would have to bring a separate action against other responsible parties.

In testimony concerning the impact of Section 126 before the Senate Environment and Public Works Committee, representatives of EPA and the Department of Justice have indicated that additional study and crafting of this provision would be appropriate. For example, they conceded that the provision could stimulate added litigation, increasing enforcement costs. [10] These concessions are a strong signal to the Judiciary Committee that it should exercise its judgment to carefully amend this provision.

The purported result of the government's reconsideration of its position does not remedy these concerns. As we understand it, the government's proposed amendment of Section 126 would allow original defendants to file contribution actions at any time. Proceedings on the claims, however, would be stayed until after judgment or settlement. This revised proposal continues to carve out one type of case from practice under the Federal Rules of Civil Procedure. It also will have the same negative impacts on judicial economy and settlement as the original Section 126 provision.

The government does have a legitimate concern in having means available to insure that its litigation is conducted in an expeditious manner and is not unduly delayed by the concurrent maintenance of third party actions. Means are available to judges presiding over these cases, however, short of the legislative limitations on third-party practice, such as those provided in the Federal Rules of Civil Procedure and the Manual for Complex Litigation, to abate this concern. Among these are the exercise of strict judicial control over multi-party proceedings, designation of a representative defendant for service of papers, as well as use of the procedures set forth in the Manual for Complex Litigation. In particular, its recommendations on the appointment of liaison counsel, cooperation among counsel, and coordination of and limitations on discovery are among the tools available to the presiding judge. Scrutiny of cases currently pending will also provide lessons from innovative case management orders as well as from cases in which the litigation has become cumbersome. Use of these devices should provide adequate assurance that the government's case-in-chief will proceed expeditiously.

A response is also necessary to the anticipated charge by government prosecutors that concurrent contribution actions as practiced under the Federal Rules of Civil Procedures and as currently under way in several CERCLA cases, will impose unreasonable burdens on government resources and result in unmanageable "auditorium" litigation. With respect to the first charge, the burden of proving a third-party action is on the third-party plaintiff, not on the government. In fact, the government has refused to take a position on the factual basis for liability of individual third-party defendants. 11/

With regard to the second concern, there is no dispute that Superfund cases are complex. Each provides a unique situation with respect to the type of relief sought, the number of parties involved, and the nature of the site. These cases can only be managed by the presiding judge who is totally familiar with these circumstances. They cannot be managed in advance by legislative amendment or by the wishes of only one side of the litigation.

Despite the failings of Section 126's impairment of the right of contribution, one aspect of Section 126 that merits support is its provision for protection from subsequent contribution suits for parties who have entered into a good faith settlement (proposed CERCLA Section 107(3), as set forth in Section 126 of S.51). Parties that settle want and deserve protection against suits by non-settlers. In some Superfund cases, parties have settled with the government only to find themselves sued for contribution by non-settlers. Congress should provide that a good-faith settlement bars any suit for contribution by non-settling parties.

The foregoing analysis demonstrates that an amendment to Section 126 is needed to prevent the negative effect such a provision would have on the judicial system and the Superfund settlement and cleanup process. The right of contribution should be affirmed, but it should not be delayed until after judgment or settlement.

IV. A Comparison of Two Superfund Cases Demonstrates Problems with the Enforcement Process

Before moving on to consider other specific areas of S.51, a comparison of two of the major Superfund cases will point up the problems of the enforcement process as well as the complications that would be added by the contribution provision of S.51.

United States v. Chem-Dyne Corp., et al., No. C-1-82-840, S.D. Ohio (Chem-Dyne), and United States v. Conservation Chemical Co., et al., No. 82-0983-CV-W-5, W.D. Mo., (CCC), are two of the most prominent multi-party Superfund litigations. In both cases the government has selected a set of original defendants and asserted joint and several liability, and in both cases the original defendants have filed third-party complaints against generators who were not sued by the government. Nevertheless, the cases have had very different histories regarding settlement and allocation.

In Chem-Dyne, negotiations among the responsible parties, including original defendants and third-party defendants, have resulted in a voluntary allocation scheme. In addition, negotiations with the government regarding remedy have been successful. As early as last fall, the parties reported to the court that a tentative settlement had been reached. In response, the court took the case off its trial docket and placed it on a settlement track. Details of the remedial action plan have since been worked out and virtually all of the responsible parties have agreed to the proposed consent decree, allocation scheme, and remedial action plan which will be filed with the court in a few days.

In CCC the negotiation process has been much more difficult. Despite the fact that the original defendants began negotiation efforts as early as March 1984, the third-party defendant generators have resisted serious negotiations regarding allocation. The original generator defendants, lacking support from the other responsible parties, have had difficulty reaching agreement with the government on remedial aspects of the case.

One reason negotiation has proved difficult in CCC is that the government chose to sue only four out of more than 150 generators of waste at the site. These four defendants do not, however, constitute a critical mass for settlement purposes, and a remedial settlement requires participation of other responsible parties. But selective prosecution can be only a partial explanation for the difficultly encountered in settling the CCC case. A more important explanation is the court's bifurcation of the case into two phases and its unwillingness to impose a judgment on third-party generators in Phase I for contribution to the original defendants. The reason the bifurcation order has deterred settlement is that the third-party defendants have been hesitant to agree to pay up-front in a settlement when non-settlement will delay payment until after Phase II litigation is ended. Just in the last few days the original defendants have reached a tentative agreement with the government on remedy, but allocation with third parties and insurance companies remains as a final hurdle.

The amendment proposed in Section 126 of S.51, which would postpone contribution actions until the completion of the first action, would have the same or even greater adverse impact on settlement than the CCC bifurcation. Third-party generator defendants would have a great incentive to take advantage of opportunities to delay their liability. Indeed, these third-party defendants could even argue under this provision that the original defendants must prove the government's endangerment and remedy case against them in the second subsequent action. Their argument would be that they were not present and cannot be bound by any decision in the first action. Avoidance of inconsistent judgments and the injustice which could result is, of course, one of the principle reasons for the joinder provisions in Rule 14 of the Federal Rules of Civil Procedure. This purpose would be abrogated by Section 126.

V. Section 133 of S.51 Would Severely Limit A Potentially Responsible Party's Right To A Meaningful Hearing on CERCLA Liability

Section 133 of S.51 would grant to the Executive Branch sweeping powers to act and to compel action under Superfund free from the challenges of responsible parties or any meaningful judicial supervision or scrutiny. This extraordinary delegation of unbounded authority to the Executive Branch is contrary to settled administrative law principles and raises basic issues of constitutional due process. In assessing Section 133, it must be kept in mind at all times that the goal of CMA is to promote expeditious cleanup and not to delay the cleanup process. A balance, however, must be struck.

The prohibition on pre-enforcement review in Section 133 of S.51 affects important rights of potentially responsible parties in two respects. First, it denies pre-enforcement review of administrative orders issued under Section 106 of CERCLA which require potentially responsible party to undertake response action. Second, the provision bars review of the selection of remedial action under Section 104 except in a cost recovery action. Pre-enforcement review in these contexts may also be viewed as "pre-construction review" as it refers to judicial scrutiny of planned or ordered response action before the construction involved in remedial work is actually begun. Again, in assessing this provision, we will consider its impact on both jurisprudential and Superfund enforcement concerns.

Under the review and appellate structure proposed in S.51, the Administrator of EPA can issue an ex parte order under Section 106(a) requiring a potentially responsible party to take extensive removal or remedial actions to clean up a site. Under the statute, and under EPA practice, the potentially responsible party need not be afforded any kind of hearing regarding his responsibility, the need for and propriety of the cleanup action, or his ability to carry out or pay for the ordered cleanup action. [12/]

Despite the fact that a Section 106 order can be ex parte, no meaningful opportunity for hearing or judicial review would be afforded. Section 133 would amend Section 113 of CERCLA so that no court could review an order until, assuming the party does not comply with the order, an enforcement action was brought by the Administrator, or until the Administrator used the Fund for cleanup and sought reimbursement under Section 107(a) of CERCLA. 13/ Any potentially responsible party would be chilled with the prospect of risking non-compliance and waiting for review until he was made a defendant in an enforcement or cost reimbursement action. An enforcement action can entail huge civil penalties under Section 106(b), and cost recovery can entail treble damages under Section 107(c)(3) as well as civil penalties.

In addition, under S.51, the scope of review when finally available in an enforcement action or a cost recovery action would be very limited and inadequate. Proposed Section 113(g) of CERCLA would limit a court's review to a potentially inadequate administrative record. 14/ Moreover, an arbitrary and capricious standard of review is specified, with both the "de novo" review and the "substantial evidence" standard proscribed. 15/

In sum, the pre-enforcement provisions proposed by the Administration and adopted in S.51 are designed to give the Administrator an unassailable power to order actions money without prior judicial scrutiny, combined with the exceptionally strong enforcement tools of penalties and cost reimbursement. In the Section 106 context, it makes non-compliance the avenue to judicial review.

Similarly, Section 133 also would cut off the rights of potentially liable parties from seeking judicial review of an EPA decision to select the remedy and incur Fund expenditures at a site under Section 104 unless and until EPA seeks to recover its costs for that cleanup from those parties in court. Review before the money is spent is the only effective means to test the necessity for or appropriateness of the response action. The government argues, and the court in Lone Pine Steering Committee v. EPA, 22

Env't Rep. Cas. (BNA) 1113 (D.N.J. January 21, 1985) has held, that there is no right to pre-expenditure review of Fund financed cleanup actions under Section 104. In addition, EPA has sought to severely limit the scope of judicial review of the government costs in Section 107 cost recovery actions. Indeed, the courts in United States v. Wade, 577 F. Supp. 1326 (E.D.Pa. 1983) and United States v. Northern Pharmaceutical and Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984) have allowed EPA to recover costs despite the fact that they were expended in violation of Section 104 restrictions.

Given the lack of judicial oversight and review, EPA has displayed a tendency to be extremely lax in cost control and cost limitation management practices. Repetitive contracts with consultants have been awarded until a consultant finally gives the right answer. (In CCC, EPA went through three full-sets of RI/FS (remedial investigation/feasibility study) contractors and even then the defendants had to take over the RI to get it done in any reasonable time.) The costs of incompetent, invalid and unnecessary work are often sought from responsible parties. (In Chem-Dyne, the E&E studies and a Weston report were acknowledged to be useless, yet the government sought to recover these costs.) In addition, there seems to be little restraint in the use of legal resources.

The Section 133 scheme would be inconsistent with the Administrative Procedure Act and the Constitution, which both call for a due process balance to the exercise of executive power and an opportunity for meaningful hearing. The Fifth Amendment to the Constitution decrees that no person shall "be deprived of life, liberty or property, without due process of the law." As one commentator has noted, "[a]t the core of this procedural due process right is the guarantee of an opportunity to be heard . . ." L. Tribe, American Constitution Law § 10-15 at 550 (1978). 16/ While the Supreme Court has adopted a balancing test for determining the nature and timing of the due process hearing 17/, the opportunity to be heard still "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S.

545.552 (1965). S.51's prohibition of pre-enforcement review would not always satisfy this requirement. 18/

In addition to these constitutional considerations, the Administrative Procedure Act ordinarily should provide separate statutory grounds for review of administrative orders under Section 106(a). 19/ While some courts have been reluctant to find an independent APA basis for review of orders 20/, both APA and due process considerations suggest that when a section 106 order has been issued *ex parte*, the judicial review hearing should be *de novo* and should not be confined to the administrative record. *See Hagar v. Reclamation District*, 111 U.S. 701, 712 (1884). 21/

While one district court has approved the approach reflected in S.51 (*Lone Pine Steering Committee*, *supra*, 22 Env't Rep. Cas. (BNA) at 1113), two district courts have been gravely troubled by such denial of due process. In *Aminoil*, the court held that it was an unconstitutional denial of due process to subject a potentially responsible party to the risk of civil penalties and treble damages before according a hearing. 22/ In *Industrial Park Development Co. v. EPA*, Civ. No. 85-0875 *Hazardous Waste Litigation Report 7265* (E.D.Pa., March 21, 1985), Industrial Park sought pre-enforcement review of preemptory orders issued without a hearing by an On-Scene Coordinator (OSC) at a Superfund site pursuant to authority granted him in a Section 106 administrative order. The court was distressed by the arbitrary orders of the OSC. Moreover, the court expressed "grave doubts" about the constitutionality of the authorities delegated to the Administrator of EPA under CERCLA because the agency's authority was exercised "without prior judicial authorization or judicial review after EPA action." 23/

More recently, the court in *U.S. v. Reilly Tar & Chemical Corporation*, Civ. No. 4-80-469, (D. Minn.), held that the treble damage provision does not violate due process requirements because the statute does not provide for mandatory penalties where the party disobeying the administrative order interposed a good faith defense to the validity of the order. This conflict among district court decisions as to the validity of the administrative order scheme points up the dilemma that a recipient of such an order faces when determining the response it will take.

As demonstrated in the foregoing analysis, the Judiciary Committee should consider the "grave doubts" and concerns expressed by the courts in Aminoil and Industrial Park. It also should consider the conflict in court decisions which give no clear guidance to a party facing a decision between compliance and non-compliance. EPA's need for expeditious cleanup, especially in emergency situations, must be carefully balanced against the constitutional due process rights of potentially responsible parties. This balancing need not delay emergency action. The government interprets Section 106 as requiring only a "risk of a risk." The harm, if any, maybe many years off. The Environment and Public Works Committee adopted the Administration's request for unlimited discretion, unencumbered by any meaningful hearing rights without any analysis or balancing of due process rights or other judicial considerations.

While the government's goal in its request for unfettered discretion may be to promote expeditious cleanup, accomplishment of that goal need not be impaired by providing for judicial review. A possible means to accommodate these concerns is to provide that where the government can demonstrate to the court that immediate response action is necessary to abate a true emergency, further proceedings on the challenge to the government's action will be stayed. Most importantly, responses to true emergencies will not be delayed. Moreover, since remedial action often requires an extensive design phase and several months of preliminary work as contemplated by the remedial investigation/feasibility study process before actual construction or other cleanup activities begin, judicial review could proceed on an expedited basis in appropriate cases without delaying cleanups.

VI. Section 138 of S.51 Would Authorize a Broad Range of Citizen Suits, Increasing Burdensome Litigation In The Federal Courts and Disrupting Justice Department and EPA Enforcement Efforts

Section 138 of S.51 would add a new Section 118 to CERCLA authorizing "any person" to commence a civil action, regardless of the amount in controversy, against (1) any person, including the United States, alleged to be in violation of any standard regulation, condition, requirement, or order under CERCLA, or (2) the President to compel performance of a non-discretionary act or duty under CERCLA. In addition, it would allow a person to intervene as a matter of right in appropriate circumstances in government CERCLA and RCRA enforcement actions.

This provision would create a new cause of action for private enforcement of CERCLA, thereby interfering with enforcement priorities otherwise established by EPA and the Department of Justice and also increasing the federal judicial case load generated by CERCLA. For example, this provision would allow any person to become in effect a "private attorney-general" and bring a suit against private parties to abate CERCLA violations.

A principle adverse result of CERCLA citizens suits would be disruption of EPA and Department of Justice management and prioritization of the CERCLA cleanup program. Prioritization is necessary so that the most dangerous sites can be cleaned up first and is central to the concept of the national cleanup program mandated by CERCLA. Citizen suits under the new Section 118 could completely disrupt EPA and DOJ prioritization. Such suits would have to be defended even if they were not a priority. Even notice of intent to file a CERCLA suit could be disruptive to efforts to manage and focus the program. Ultimately citizen suits could lead to an excess of Superfund litigation, while at the same time diluting the EPA and DOJ efforts such that action at sites posing major risks would be delayed. Citizen suits under CERCLA should be of significant concern for the judiciary since such suits inevitably involve issues of great complexity, uncertainty, and entail many parties and huge expenditures of time and resources.

One of the principle functions of a citizen suit is to spur federal enforcement. Section 118(b) addresses this goal by requiring 90-day notice by a citizen of an intent to sue in order to afford the government an opportunity to respond. The Senate report acknowledges that "90 days is not sufficient time" for EPA to conduct the studies necessary to initiate an enforcement action. [24] The notice provision is not workable, and thus a major purpose of Section 118 will not be served.

Beyond the disruption of priorities, waste of private and judicial resources on transaction costs and delay of the overall cleanup program, citizens suits would also drain very substantial amounts of extra resources from the Federal courts and the Department of Justice.

Similarly, overloading of the federal courts has become an increasing concern in recent years. As Chief Justice Burger has recently noted, Congress has passed over 100 statutes conferring jurisdiction on the federal courts since he took office, and the load of federal courts has multiplied almost by a factor of three since 1969. This overloading together with the increasing complexities, costs, and delays of federal court litigation, has given impetus to a growing movement to develop and utilize alternative or at least more efficient judicial dispute resolution mechanisms. [25] Chief Justice Burger has eloquently stated the need to be cautious about loading new problems onto the federal courts and to consider other ways of resolving problems:

> It is becoming trite to say Americans tend to be the most litigious people on the globe, using the courts for airing all manner of grievances, disputes and perceived "entitlements." The escalating demands imposed on the courts have led to their becoming congested, slow, and costly. Fortunately, there has been a steady but all too limited increase in the number and variety of alternative dispute resolution programs, largely stimulated by the American Bar Associa-

> tion following the Pound Conference of 1976. This reflects the view that courts are not the appropriate forums for the resolution of many problems, regardless of the condition of their dockets. [26]

Chief Justice Burger's remarks present a compelling argument that Congress should not blindly stoke the furnace of federal court citizens suit litigation under CERCLA.

In the past two years, there has been a surge in citizen suits under federal environment statutes. According to a 1984 survey by the Environmental Law Institute, 349 citizen suits had been filed since 1978, and 214 of these were filed under the Clean Water Act since 1982. This sharp rise has been due to concerted efforts of several national and regional organizations. Adding an expansive citizen suit provision to Superfund can be expected to lead to significant litigation.

In addition to disruptions of priorities and burdening of the courts, several of the provisions of Section 118 raise serious constitutional and policy issues.

Only a person who has standing may commence a suit. Standing is a fundamental requisite derived directly from Article III of the Constitution. In order to have standing, a person must show that his or her interests are adversely affected by the conduct of the defendant. [27] Statutes such as the Clean Water Act limit suits to citizens having standing. [28] Section 118 of S.51 contains no such limitation, thus encouraging suits by individuals having no interests that are adversely affected.

Section 118(c) of S.51 authorizes a citizen to intervene as a matter of right, unless the defendant can demonstrate that the citizen's interests are not adequately represented. By reversing the normal rule under Rule 24 of the Federal Rules of Civil Procedure, the bill imposes an additional burden upon the government. Intervention by parties whose interests are adequately represented may impede and delay litigation commenced by the government, and thus should not be encouraged.

The remedies authorized in the bill are also troublesome. Section 118(a) authorizes a citizen to seek penalties as well as compliance. Only the government should be able to seek penalties. The imposition of penalties is a governmental function as to which prosecutorial discretion is important. In addition, Section 118(f) contains a vague reservation of citizen rights to "seek any other relief" under "Federal . . . common law." Our federal system does not empower the federal courts to create common law causes of action.[29] The reservation in Section 118(f) may encourage burdensome suits which go well beyond the scope of the federal Superfund program.

Nothing in Section 118 of the bill protects against duplicative and inconsistent enforcement. Citizens could bring suit concerning violations of Superfund, for example, for failure to notify under Section 103 of CERCLA. Defendants could agree to a settlement with the citizens group. Because it was not a party, the government or a second citizen or citizens group could bring a second suit regarding the same matter.

Deletion of the citizen suit provision will not leave citizens without means for input into the process. Citizens already have opportunity to comment on proposed remedial actions as well as on proposed settlements. A new cause of action is not required. For these reasons, serious consideration should be given to the S.51 citizen suit provision.

FOOTNOTES

[1] The Administrative Conference recommendations were adopted when EPA's Settlement Policy included the "80 percent rule" requiring that a settlement offer cover at least 80 percent of cleanup costs before it would be considered by EPA. The revised version of the Settlement Policy eliminates the 80 percent threshold and substitutes the directive that the Agency will negotiate "only if the initial offer from PRP constitutes a substantial proportion of the costs of cleanup."

[2] See *e.g.*, "United States Response in Opposition to Defendants' Motion to Dismiss," *United States v. Conservation Chemical Co.*, *et al.*, Civ. No. 82-0983-CV-W-5, W.D. Mo., filed May 6, 1983, at 218; "Response of the United States Party Defendants to Dismiss, Strike and/or for a Separate Trial of Third-Party Claims,"

United States v. Chem-Dyne Corporation, et al., Civ. No. C-1-82-840, S.D. Ohio, at p.5; "Response of the United States to Motions to Dismiss Cross Claims," United States of America v. Seymour Recycling Corporation et al., Civ. No. IP80-457-C, S.D. Ind., filed October 1984, at p.3.

[3] S.51 Report at 103.

[4] S.51 Report at 44. The Committee would even require compulsory counterclaims to be pursued only "after completion of the case-in-chief." Id. (emphasis added).

[5] Indispensable parties are those in whose absence from the case complete relief could not be accorded, or who have interests that might be impaired if absent from the case, or whose absence might subject other parties to risk of multiple conflicting judgments. Rule 19(a), F.R.C.P. Such parties might well include those against whom CERCLA defendants would have contribution claims.

[6] Rule 42 gives courts great latitude to try parties together when there are common questions of fact or law, or separately, and to otherwise issue management orders "to avoid unnecessary costs or delay" or to further "convenience," "expedition" and "economy." Rule 16 provides similarly broad case management authority.

[7] See Notes of Advisory Committee on 1966 Amendment to Rule 19, "General Considerations," Federal Rules of Civil Procedure.

[8] United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966). See also Mosley v. General Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974) ("[s]ingle trials generally tend to lessen the delay, expense and inconvenience to all concerned").

[9] See, e.g., Uniform Comparative Fault Act, 12 U.L.A. 43 §2(c) (1985 Cumulative Annual Pocket Part).

[10] See Environment Reporter (BNA), 2124 (April 5, 1985).

[11] See "Response of the United States to Motions of Atlantic Richfield Co. and Cummins Engine Co. for Dismissal with Prejudice or, Alternatively, for Summary Judgment," United States v. Chem-Dyne Corporation et al., Civ. No. C-1-82-840, S.D. Ohio, dated March 13, 1984 at pp 1-2: "Both motions focus on the issue of causation under CERCLA and argue that neither movant can be liable under Section 107 of CERCLA, 42 U.S.C. 9607, because no hazardous wastes of theirs were ever present at the Chem-Dyne site. The United States takes no position on that factual issue. However, in making their arguments, the movants have urged this court to adopt an erronoualy narrow view of CERCLA causation which the United States wishes to correct."

[12] Section 106(a) provides no guidance at all regarding specific procedures for issuing administrative orders. Instead, Section 106(c) requires that the Administrator issue guidelines for the exercise of their authority:

> The Administrator of the EPA shall . . . establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administrated by the Administrator of the EPA to effectuate the responsibilities and powers created by this Act.

42 U.S.C. § 9606(c).

The EPA Section 106(a) guidelines, however, fail to specify any significant conditions and procedures for issuing a Section 106(a) administrative order. See Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, 47 Fed. Reg. 20664 (May 13, 1982). Instead, they stress the Agency's need for "flexibility" and its intent to make "case-by-case" decisions on use of Section 106. 47 Fed. Reg. at 20665. In the only discussion of procedural requirements for issuance of orders, the guidelines declare that EPA will "attempt to provide written or oral notice," but that such notice "is not, however, a condition precedent" to its acting. Id. at 20666. From this, it is apparent that it is EPA's policy to issue administrative orders without a hearing.

[13] Section 113 would be amended by the addition of the following subsection:

> (f) No court shall have jurisdiction to review any challenges to response action selected under Section 104 or any order issued under Section 104, or to review any order issued under Section 106(a), under Sections 107 to recover response costs or damages or for contribution or indemnification; (2) an action to enforce an order issued under sections 104 or 106(a) or to recover a penalty for violation of such order; or (3) an action for reimbursement under section 106(b)(2).

[14] Parties to an action to recover remedial response costs where there had been no Section 106(a) order might be better off because under new Section 104(j) they presumably would have had a right to comment on any remedial plan.

[15] New subsection 106(b)(2) provides a limited mechanism for review of a Section 106 order after compliance and after making a claim against the Fund. Nevertheless, the limitations on this right of review will render it of little use in obtaining review of an erroneous or unjust order.

[16] Accord, Lichter v. United States, 334 U.S. 742, 791 (1948); Nickey v. Mississippi, 292 U.S. 393, 396 (1934); K. Davis, 2 Administrative Law Treaties § 12:13 (1979); see also Northern Pipeline Construction Co. v. Marathon Pipe-Line Co., 458 U.S. 50, 69 n.23 (1982) ("when Congress assigns . . .matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review").

[17] Ingraham v. Wright, 430 U.S. 651, 680 (1977). In particular, the requirements of due process as to the timing of a hearing depend on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[18] Post enforcement hearings do not always satisfy the constitutional standard. In Armstrong v. Manzo, 380 U.S. at 545, the Supreme Court held that an adjudicatory hearing after the issuance of a decree did not satisfy the demands of due process because at that stage the petitioner, rather than the party seeking the decree, was forced to bear the burden of proof:

> For 'it is plain that where the burden of proof lies may be decisive of the

> outcome.' Yet these burdens would not have been imposed upon him had he been given timely notice in accordance with the Constitution. 380 U.S. at 551 (citations omitted).

See also White v. Minter, 330 F. Supp. 1194, 1198 (D. Mass. 1971) (in child custody dispute availability of subsequent *habeas corpus* action does not satisfy due process because mother would have to bear burden of proof).

19/ 5 U.S.C. §§ 702, 704.

20/ *See Earthline v. Kin-Buc, Inc.*, No. Civ. 83-4226, Tr. at 19 (D.N.J., July 23, 1984) (Section 106(a) order *not EPA*, 599 F. Supp. 69 (C.D.Cal. 1984) (pre-enforcement judicial review of Section 106 orders precluded, thereby making the civil penalties and treble damages provisions unconstitutional).

21/ *See United States v. International Harvester Co.*, 387 F. Supp. 1338 (D.D.C. 1974), where the court held that in an action to enforce a penalty imposed without prior hearing, "trial *de novo* is required prior to judicial enforcement of a civil penalty set without consulting the party to be punished." 387 F. Supp. at 1340. Even if it could be argued that due process did not require *de novo* judicial review in the absence of an administrative hearing, the Administrative Procedure Act has been read to impose an identical requirement. *See First National Bank of Smithfield v. Saxon*, 352 F.2d. 267, 271 (4th Cir. 1965) (where no administrative record existed, review was proper under the Administrative Procedure Act authority for *de novo* review). *But see Lone Pine Steering Committee v. EPA*, 22 Env't Rep. Cas. (BNA) 1113 (D.N.J., January 21, 1985) (denying *de novo* review of an EPA cleanup decision).

22/ The court described Aminoil's rights as resting "on the fundamental due process requirement of an opportunity to be heard . . . at a meaningful time and in a meaningful manner," and concluded:

> The daily penalty and treble damage scheme set forth in CERCLA clearly falls within the scope of this due process limitation. No opportunity is provided for a hearing involving the alleged responsible parties prior to the issuance of the administrative order. More importantly, no procedure is provided through which an alleged responsible party promptly could challenge the validity of the administrative order or the assessment of penalties. These parties are left to await an enforcement or recovery action, which may occur at some indefinite time in the future. In the meantime, the daily penalties continue to accrue. Furthermore, no clear right exists for these alleged responsible parties to comply with the administrative order and then challenge its validity and seek reimbursement from the government.

599 F. Supp. at 74, 75 (citations omitted). The result of this scheme was to make compliance "the only feasible alternative," a situation which controverted the due process requirements set out in *Wadley Southern Railway Co. v. Georgia*, 235 U.S. 651, 661 (1951), because it made the right to judicial review "merely nominal and illusory." 599 F. Supp. at 75.

To the *Aminoil* court, the combination of the right to "a fair hearing unencumbered by the chilling effect of excessive sanctions if one were to obtain such a hearing and lose on the merits," *id.*, and the "serious risk that plaintiffs will erroneously lose their property interest in the funds expended in complying with the order" outweighed the government's interest in not paying all costs of Superfund emergency response actions. *Id.* at 76.

23/ S. Rep. 99-11 at 62.

24/ Nevertheless, an injunction against EPA expenditures for a cleanup protested by the plaintiff was denied because plaintiff failed to show irreparable injury.

25/ Burger, Warren E., 1984 Year End Report on the Judiciary, 15-16 (1984).

26/ Burger, Warren E., 1982 Year-end Report on the Judiciary, 8-9 (1982) (footnote omitted).

27/ See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Allen v. Wright, 104 S. Ct. 3315 (1984).

28/ 33 U.S.C. § 1365(a), (g). See S. Conf. Rep. No. 1236, 92d Cong., 1st Sess. at 146 (1972).

29/ Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); City of Milwaukee ~~v. Illinois, 451 U.S. 3~~04 (1981).

Senator SPECTER. I would like to turn to Mr. T. Lawrence Jones, president of the American Insurance Association.

STATEMENT OF T. LAWRENCE JONES

Mr. JONES. Thank you, Senator Specter. I am T. Lawrence Jones, president of the American Insurance Association and I am accompanied by Dennis R. Connolly who is our vice president for liability issues and has a great deal of experience in this area.

I think the most important thing for me to say to this committee today is that the major insurance companies, the ones that have supplied the liability insurance in the past, have had to withdraw from the market under the present law.

The reason is the policies of the EPA and Justice. They have gone to court and advocated that the standard should be strict, joint and several liability, and that it should be applied retroactively. That creates a very unfair situation and a very unpredictable situation from the standpoint of insurance companies, and they are unable to continue to provide insurance.

In the Wall Street Journal today, there is another story about people being unable to get liability insurance, this time in the pesticide area.

They do not allow any defenses. When we go out and rate a person as to what the exposure might be we are unable to determine it because he might be held liable for the whole cleanup of a site, not just his contribution to it. Regardless of the care that he takes in the conduct of his affairs with the checking of what he disposes of, or where he disposes of it, or the reliability of the owner of the site where he disposes of it, it matters not, there is no defense, and they treat the guilty and the innocent alike, that is very unfair and certainly not a regime under which the insurance industry can operate.

When the Justice Department testified before you on Friday, the representative of the Justice Department spoke of prosecutorial discretion.

That is a criminal concept and I am afraid that that is much of the manner in which EPA and Justice have gone about the cleanup process.

My predecessors on the panel have done a good job of covering the four sections of the Act that have been brought to you under your jurisdiction, and I would just simply add that these sections, indeed three of them, make the environment worse, and very much uninsurable.

Section 126 about the contribution of the parties, and section 133 limiting the review of important decisions of EPA are simply there for the convenience of the agencies, and they do try to circumvent due process, fair procedure, and the safeguards that we have built into our legal system.

As to citizen suits under section 136 I would just like to say that in this situation we agree with EPA, with Justice, and with the Department of Defense, that the type of issues that are before the court and before EPA cannot be handled well in citizen suits. It is not the kind of environmental legislation that we have on the books already.

There are complex issues. This would be disruptive and further delay cleanup. The judicial review section under 132 offers some improvements in what it changes, so that all circuit courts across the country can be brought into this. They have arranged conflicts in a good manner and certainly ought to be tried.

I will be happy to answer any questions, Mr. Connolly and I would, about our statement or about the other issues that have come up.

Senator SPECTER. Thank you very much.

[The statement follows:]

STATEMENT
OF THE
AMERICAN INSURANCE ASSOCIATION

The American Insurance Association (AIA) is a trade organization which represents 170 property and casualty insurance companies. The member companies of the Association provide the majority of commercial liability insurance written in the United States.

We appreciate the opportunity to testify before you on CERCLA. We see under CERCLA a statutory scheme which cannot be insured. We have two fundamental concerns with Superfund. Insurance policies drafted long before the enactment of Superfund are being called upon to pay Superfund losses and defense costs. These are expenses which insurance policies intended to exclude. Coverage is being made available through tortured decisions arrived at in some jurisdictions. Insurers who never collected premiums for the losses and expenses are now being called upon to fund responsible parties' liabilities under this law. The direct effect of this is readily apparent in the EPA suit filed this month on a judgment in a cleanup case against an insurer. (See U.S. v. Continental Insurance Company, U.S. District Court, MO). We are also concerned because a system which has retroactive, strict, joint and several liability, and which is dependent for the avoidance of excess upon prosecutorial discretion, cannot be insured.

Lee Thomas, EPA Administrator, on Friday, June 7, 1985, described joint liability as an "extraordinary tool which must be rationally used." Department of Justice Lands Division Chief, Henry Habicht, stated that "prosecutorial discretion must be used to prevent extreme cases". He admitted that extreme cases might cause the courts to drop joint liability. When discussing retroactive liability he seemed to indicate the Justice Department had concerns of constitutionality if it was applied too rigorously.

On a very practical level, these aspects of unfairness are the same elements of a liability scheme which render it uninsurable. An insurer cannot assess the loss potential and risk characteristics of any applicant for coverage. The firm may be exposed to total liability for losses primarily caused by the acts of others. It may also be held liable even where its own activities were faultless and in complete compliance with the law. The system in place now provides no safe harbor and offers no reduction of liability for good conduct. It is a system entirely composed of punishment with no reward for good behavior. A liability system of this nature cannot be insured. It may well be that the pursuit of prominent, easily identif[illegible]dants who have kept records and behaved responsibly will result in [illegible]hich are relieved of their liability.

Mr. Habicht said that "joint and several liability simply shifts the burden of proof and allows the parties to come forward with their case." He pointed out that this is true when there is a divisible harm. Unfortunately, there is rarely a divisible harm within the context of nontraumatic injuries in the cleanup context. In many cases, however, there are equitable principles upon which contributions to the causation of harm can be shown, but under the Justice Department's interpretation of Superfund, these showings cannot be made. We who are experts in claims processing believe this is unfair and results in delay in cleanup.

The EPA shows its concern with these unfair aspects of Superfund by assuring there will be sound exercise of "prosecutorial discretion" and offering a hollow proposition to fix the poor contribution section in S.51. The EPA appears to concede it is unfair to require parties to wait until after judgment to pursue contribution. They now seem to be considering a proposal that would allow the naming of third party defendants but would delay the litigation of liability until conclusion of the case in chief. The two proposals both seem to be fundamentally unsound. They will, it seems, always require two complex trials. In addition, they strip the District Courts of powers they already have to handle their case loads in an expeditious way. They prevent the courts from ever handling both contribution and case in chief issues at one trial even when that will produce the most rapid results.

The fact that EPA is asking for special civil procedure roles and an exemption from traditional approaches to pre-enforcement review shows an excessive reliance on the benign benefits of "prosecutorial discretion". Insurers can't underwrite against standards so vaguely articulated. An insurer would not only need to know what the law might be now and in the future, the insurer must also judge potential liability on who might be EPA's administrator on the day a case reaches court.

We do not believe that a preclusion of pre-enforcement review is consistent with sound claims settlement or good cleanup. While environmental cleanup technology may be developing rapidly, there are few who deny that it is still in its infancy. To grant EPA decisions exclusion from review until after recovery actions have been initiated places overwhelming burdens on potentially responsible parties. It may also result in delay of cleanup and reliance on a single type of technology which may not prove out over time. Insurers have learned in the claims process that open discussion and pursuit of alternatives usually achieves the best results. It is also likely to promote technological development where its needed. Instead of prohibiting review we should seek it and try to expedite it.

We have found Superfund to be a litigation nightmare which has involved our member companies in vast expenses for lawyer fees. We think the suggestion to add a citizen suit provision will only spread that misery. These cases are complex matters best initiated by the government. The grant of citizen suit authority could so expand the number of cases as to represent a threat to the work load of the Federal Courts.

In summation we insurers are concerned that Superfund is not and was not insurable. We are concerned because some courts have found coverage in our policies where none was intended and no premium was collected. The sections of Superfund the Senate Judiciary Committee is considering all form part of a system which is unfair and cannnot be insured. For a fuller exploration of these matters and Superfund in general, we refer you to the testimony of the insurance panel before the Senate Committee on Environment and Public Works on April 3, 1985.

THE NEW YORK TIMES, FRIDAY, MAY 24, 1985

Superfund, Superbust

By T. Lawrence Jones

WASHINGTON — The Superfund, created in 1980 to deal with toxic-waste sites, is doing far less than a super job. When the Superfund law — the Comprehensive Environmental Response, Compensation and Liability Act — was enacted, it was to provide funds, mainly from special taxes on the chemical and petroleum industries, to clean up hazardous dump sites, especially abandoned ones.

In nearly five years, Superfund has had available to it $1.6 billion. But it has produced precious little cleanup. The Environmental Protection Agency, which administers the law and oversees cleanup activities, estimates that 2,000 sites may be eligible for its national priority list of serious waste sites out of a possible 19,000 sites countrywide that need cleanup. Other agencies, such as the Congressional Office of Technology Assessment and the General Accounting Office, estimate an even larger number.

Yet only six sites — six relatively simple sites — have been cleaned up. The Office of Technology Assessment questions whether even these sites were cleaned up totally and permanently. In a recent report, that office concluded that there were thorough cleanups at two of the sites that posed only minor hazards. It said that a thorough cleanup was done at one but that some problems remained, including the need for medical testing of former workers exposed to radium. But, it said, actions at three sites have not amounted to permanent cleanups. Clearly, this adds up to an insignificant accomplishment.

In place of a cleanup, the Superfund has triggered a seemingly endless series of lawsuits, which attempt to determine who did what in creating a hazardous waste site and to fix liability for the cost of cleaning up the site. But they do so in a way that is unfair, costly and time-consuming.

Many sites contain the waste from many businesses. Some users may no longer be in business. Some may have deposited very little; others a great deal. Much waste is not toxic; some is. It is not easy to identify the toxic substances or who deposited them. Yet the Government sues as many users as are accessible, claiming that each is liable for the total cost of cleanup if no one else contributes. The Government sues companies that have not used a waste site for 20 years or more. And it sues firms that used a site as they were instructed to do 20 years ago. Some companies seem to be selected not because of the extent of use but because they have lots of money and will be able to pay the entire cost of cleanup.

Many companies that have been sued feel they have been treated unfairly. They react strongly. They sue other firms that used a site in order to get help in paying cleanup costs. Others, especially those that never disposed of any toxic waste, fight back in anger. Small companies resist desperately when the Government alleges that they can be held separately liable for the entire cost of cleanup if they cannot find others to help.

An incredible web of litigation has been created. Legal fees soar. Hazardous and toxic materials from these sites continue to spoil the environment. It will take years to sort out these suits. In the meantime, litigation costs grow and a cleanup is delayed.

In short, Superfund's administration and enforcement are failures. They cost a king's ransom and more. They produce minimal cleanup of existing sites. They do not minimize harm to people and property. They emphasize judging, but judge unfairly.

Recently, the pollster Louis Harris reported that 63 percent of Americans believed environmental cleanup should take precedence over economic growth and that the voters are "literally furious over what they perceive as foot-dragging." As a result, they want environmental protection laws to be re-enacted and toughened.

The nation needs to review its attitude toward waste management and toward the laws that govern environmental liability. Such a review is urgent now, as Congress considers re-authorization of the Superfund law. Superfund is a good idea. But as interpreted and enforced, it is a failure. Congress should not re-authorize it without major changes. A few cosmetic improvements are not enough. It must be totally restructured. □

T. Lawrence Jones is president of the American Insurance Association, a trade organization that represents casualty insurance companies.

Senator SPECTER. The Department of Justice took the position on Friday that they would not expect to have EPA's action against the original defendant concluded before claims for contribution or indemnification, but they did make a reference to some modifications in the procedures which would be followed by the trial judge.

And I asked the question at that time, whether they sought to change the rules of evidence, and they said well, they did not intend that.

Let me start with you on this, Mr. Frost. We were talking about this before. Is the total position of the Justice Department encompassed on what has been designated a fallback position that, quote, "All proceedings or claims in the nature of contribution or indemnification shall be stayed pending entry of judgment or settlement on the claims of the United States, or the state under this section," under section 106?

Mr. FROST. Well, that is the language in their fallback proposal that troubles me because what it means is——

Senator SPECTER. That is all there is to their fallback proposal.

Mr. FROST. Excuse me?

Senator SPECTER. That is it.

Mr. FROST. This is their fallback proposal, I believe.

Senator SPECTER. Well, it does not seem to me that that is much different from their original proposal. They are saying that you can bring contribution or indemnification claims but they are stayed.

Mr. FROST. You can bring, you can file a law suit against the people and they are a party to the case, but your contribution action against them would be stayed under this provision. That is a change in the Federal rules and that would forbid Judge Rubin to use the——

Senator SPECTER. Certainly a change in the Federal rules but is it a change from their original position? It does not seem to be to me.

Mr. FROST. In fairness to the Justice Department, there is a change in their original position.

Senator SPECTER. What is the change? Defend their position, Senator Frost. What is their position?

Mr. FROST. Well, the change that I understand, is that if you name the people and bring them into the law suit in the beginning, then they can probably be bound in terms of the remedial determination.

In other words, you will not have to litigate the proper remedy all over in the second contribution action. Having been named, they will get some kind of service through liaison counsel, and if they do not like the remedy, they can come in and be heard on it then. So it will avoid some of the terrible——

Senator SPECTER. The third-party defendants would be present in court and would have a right to examine and cross examine during the course of the remedy proceeding?

Mr. FROST. If they are going to be bound by the judgment in that first phase, they would have to be.

Senator SPECTER. Well, but that is the question. You say they are going to be bound to the judgment and my question is, Will they be permitted to be present and cross examine? Do you think they will?

Mr. FROST. I believe that is the intention of the fallback provisions.

Senator SPECTER. So even though the proceedings are stayed as to them for contribution or indemnification, they are parties for other procedural aspects?

If you say the proceeding is stayed, I do not know what it means in terms of what the rights are of an additional defendant at that stage.

Mr. FROST. You know, I really agree with you. The problem with the way they have it is that if it is stayed, you cannot bring them into the settlement process with any teeth.

Senator SPECTER. Well, the Department of Justice backed right down on this issue on Friday, and perhaps we did not pursue them closely enough as to what kind of a procedure they anticipate; but if you start to change the long-established judicial procedures you get into very thin ice, without any real experience as to what is going on.

Mr. FROST. In my view, the courts should manage these problems and perhaps Judge Renfrew can expand on it.

Senator SPECTER. So you think it is preferable for the courts to manage these matters as contrasted with having the Congress try to write out all the rules and altervatives as to what would happen in a court proceeding?

Mr. FROST. These cases are very individual matters. I think they need——

Senator SPECTER. I am kidding about having the Congress write them all.

Mr. JONES. Senator Specter, can I give my——

Senator SPECTER. Well, Judge Renfrew was going to make a comment on it. Do you want to proceed?

Mr. RENFREW. Well, I think the Justice Department should be asked what their position is, because as I read the language, it certainly does not suggest that the third-party defendants have the right to participate in the initial proceeding. Indeed, the arguments and justifications given for their position of abrogating the Federal rules would suggest that they would not permit such intervention and participation.

Senator SPECTER. Would they be bound if they cannot participate?

Mr. RENFREW. In my judgment, no, you would have the second trial again.

Senator SPECTER. You would have to go through it all again.

Mr. RENFREW. Exactly.

Senator SPECTER. Mr. Jones, you had a comment that you wanted to make on this point?

Mr. CONNOLLY. Well, perhaps I can make it.

Senator SPECTER. Or Mr. Connolly does?

Mr. CONNOLLY. Connolly. The Justice Department really did not spell out——

Senator SPECTER. You name, sir, is——

Mr. CONNOLLY. Connolly. Dennis Connolly.

Senator SPECTER. Thank you.

Mr. CONNOLLY. I do not think that the Justice Department spelled out precisely what they had in mind. I think the idea that somebody might be bound without having an opportunity to be heard would be catastrophic, probably unconstitutional, but I am not sure that they were ruling that out.

Nevertheless, the process clearly takes it away from the discretion of the judge.

Senator SPECTER. You think if somebody could not be heard, that probably would be unconstitutional, Mr. Connolly?

Mr. CONNOLLY. I would welcome the opportunity to argue that on an appeal. I think the most detrimental part of it is that this mandates two trials in every case. From our point of view, that is a tremendous expense that we often bear.

Mr. JONES. That was certainly not changed.

Senator SPECTER. I think we have your point on the desirability of having the actions together, and I think from the tone of what the Department of Justice and EPA had to say last Friday, that they do not have a serious disagreement with that point.

Let's move on to this business about judicial review, and let's take up the concerns which were raised by EPA about delays.

There was a suggestion made by you, Mr. Mott, that you could proceed with declaratory relief. What did you mean by that, only with declaratory relief?

Mr. MOTT. Senator, the Government witnesses, particularly the Department of Justice on Friday, had an elaborate explanation about why judicial review would be bad, a long explanation about why it would mean injunctions, which is nowhere in the Administration Procedures Act, or the Federal Rules, or the existing law at all.

Senator SPECTER. What did you mean by your statement, only declaratory relief? What did you mean?

Mr. MOTT. Well, what I was saying is that judicial review of EPA's decisions on a remedy is not synonymous with enjoining EPA, that typically, the record of decision that selects a remedy occurs in a year, or longer passes, in still planning that remedy before it is actually constructed, and that period would typically provide ample opportunity for a district court simply to look at the remedy under the existing standards of the Administrative Procedures Act to determine if it was appropriate before it was built, and——

Senator SPECTER. I do not follow. EPA hands down a remedy and they want to get on with it, and they say if there is a chance for judicial review, it will slow up the remedial action.

Now, what is the answer? It does call for remedial action, does it not?

Mr. MOTT. No, not necessarily.

Senator SPECTER. Well, why not?

Mr. MOTT. Because declaratory relief could proceed concurrently with all of EPA's activities.

Senator SPECTER. So EPA can go ahead and do whatever it is they want to do; you do not get a stay of proceedings. They can go ahead, but you can pursue a judicial review at the same time with their carrying out their remedies?

Mr. MOTT. That is correct.

Senator SPECTER. Is that very realistic?

Mr. MOTT. Well, we——

Senator SPECTER. I mean if you had a case in court and EPA is going ahead and doing it all, and then the judge is going to decide in the course of the period of time—it is a race as to whether he finishes his judicial review before they finish the remedy?

Mr. MOTT. Well, it is a question, really, where you can rely I think on the discretion of the Federal judges. We have the——

Senator SPECTER. Well, wait 1 minute; wait 1 minute. What is this judge's standard? He has got discretion, but what is his standard for hearing it and stopping EPA, if there is to be any meaningful review?

Mr. MOTT. Well now, hold on a second. Let's go back.

Senator SPECTER. Fine.

Mr. MOTT. In this period, after they decide on what the remedy is, they have all the evidence in the record, and under their rules the record closes, they do not start constructing that remedy at that point.

They have to go into an elaborate series of, I think unduly cumbersome, and probably not terribly rational Government contracting provisions with the Army Corps of Engineers on prescreening contractors and going out for bids, and then a design study to design the remedy. Now all that goes on before they build it, and during that period, which is generally on a complex project——

Senator SPECTER. So your point is however slow the courts are, they are faster than EPA's procedures?

Mr. MOTT. That is about the bottom line, Senator. Now the second piece of that is that there could be an exceptional case, and we had one——

Senator SPECTER. Is there anybody here from EPA today? They at least ought to be able to confront their accusers, shouldn't they?

Mr. RENFREW. Senator, if Mr. Mott is finished, I would like to suggest, that at least from the American Petroleum Institute perspective, we do not agree that the court should be restricted to just declaratory judgment. Indeed, the present act contemplates that if there is an emergency situation, immediate and substantial endangerment to public health and environment, the court can act right now.

And indeed, on the whole question of whether a court should issue a stay of an administrative proceeding, one of the factors that a court would look at would be would the issuance of the stay harm the public? Would it harm the environment?

Senator SPECTER. Judge Renfrew, does the court now have the power under existing legislation to issue a stay?

Mr. RENFREW. Yes.

Mr. MOTT. And I was not suggesting that a stay or an injunction might not be appropriate.

Senator SPECTER. Well, wait a minute; wait a minute. What is that for the purpose of reviewing what EPA has done?

Mr. RENFREW. Oh, yes; oh, yes.

Senator SPECTER. Then how does that differ from the kind of judicial review you are proposing?

Mr. RENFREW. But under Senate 51, the court would not be permitted to exercise its judicial review until there was an entry of an enforcement order, which would put a party in an untenable position, because if the EPA thought that you were unreasonable in resisting the enforcement order, you would be liable for treble damages or you would already have had to pay the costs and be seeking them in a recovery or reimbursement action. Under the proposed section here, that is the only time you could get judicial relief.

Mr. MOTT. Now we had a case where we sought an injunction of the EPA decision as to certain activities, for example, Senator, and that was activities we were going to conduct. We offered a signed stipulation that we would design the EPA remedy, while the district court reviewed whether it was the necessary remedy before it was built, and in the interim we would pay for the design of it and we would proceed. We even offered that the portion that we did not dispute could be built and in fact we offered to get together the funding to build it, even while we were reviewing then the question of whether that last segment of construction that we were challenging needed to be built.

So there could be a case where no forward activity of the agency was stopped at all, and there could be declaratory review while they were designing or planning, or certain actions might be enjoined pending whether the private party was going to agree to do them.

The standard for injunctions would not be changed, I think, under any of our proposals. One of the classic tests is the public interest, so that a judge would enter an injunction against EPA only if he could say that the public interest was satisfied, and as to what facts may or may not satisfy that, I think that is best left to the Federal judiciary.

Senator SPECTER. Mr. Mott, you say that on occasion you have brought in the EPA and tried to settle cases and have not been able to even get any consideration of your effort to settle the cases?

Mr. MOTT. Yes, Senator.

Senator SPECTER. How many times have you tried that?

Mr. MOTT. Probably over the last 4 years, a couple of dozen.

Senator SPECTER. And what happens when you go in? Do they say they cannot settle the case because they do not know enough about it, they do not know how much to charge you, what to settle it for?

Mr. MOTT. Well, there are combinations of things. If they do not know enough about the remedy, they say that they do not know that. We offered to do the studies to define it, and they say they do not want us to do the studies unless we stipulate in advance we will implement any remedy they pick, regardless of cost.

Depending on the maturity of the case, there is a different answer, but the inevitable result is, a large number of companies are turned away from the process.

Senator SPECTER. Well, as you describe it, it is just totally irrational, if they will not discuss any settlement proposal with you. Is that what you are saying?

Mr. MOTT. Well, what has happened, Senator, is they have been——

Senator SPECTER. Is there any element of rationality in their refusal to discuss a settlement with you under the circumstances you just described?

Mr. MOTT. Yes, there is.

Senator SPECTER. Tell me about it.

Mr. Mott. The sole element of rationality is the Government would like to aggressively manage and win and prevail on every case it has, every issue, and completely control it, and if the purpose of Superfund is——

Senator Specter. Rather win than settle and have the same result?

Mr. Mott. Right. And they would rather——

Senator Specter. And that is an element of rationality?

Mr. Mott. From their point of view, if their point of view of prosecutors is that they are going to have—they may only have six cleanups so far, but their six cleanups, that by God, they watched every nickel, and every decision was an EPA decision.

If that is the purpose of Superfund, that is what we have; if the purpose is to broaden that and not have a bottleneck at EPA, and involve a bigger commitment of resources——

Senator Specter. That is the best you can do by way of defining some element of rationality in their approach?

Mr. Mott. I would welcome the other panel to do it, Senator, but I think that is it. They want to make sure that every one they do is one they feel——

Senator Specter. Mr. Mott, I think you have failed to define any element of rationality in their approach. As you describe it, it does not make any sense that they will not listen to a settlement proposal.

Mr. Mott. Well, I do not know why——

Senator Specter. I would like to have you pursue that with Mr. Marks on my staff, with the EPA people, to see what it is they are doing.

Maybe that is what Mr. Jones was talking about on prosecutorial discretion.

Mr. Mott. I would be delighted to do what we can. We will also have language on some of this. Some of the language that we would suggest in changing is no more dramatic than taking the explanation of the existing law, section 104(a) that was in the Senate Environment Committee Report in 1980 and make the explanation of that provision the statutory language instead of the language that is in S. 51.

It is not very dramatic changes but I think the thing that is lost here is that the goal is to clean up sites, and to do that, if EPA and the Justice Department have to sometimes be flexible, and have less than a blank check signed by companies, that that may be the price to get—that certainly is the price to get more cleanup done.

Senator Specter. Judge Renfrew, would you disagree with what Mr. Mott has described as the consent decrees, that EPA is always right? Have you entered into any consent decrees with EPA?

Mr. Renfrew. I would not—in the first place, I cannot speak for what Mr. Mott's view is, but I think it is somewhat unfair to ascribe to both the EPA and the Department of Justice a motive solely of win at all cost. I think one of the concerns that the EPA has in these matters is the concern of dealing with this Congress, and they have been faulted in the past for their methods of attempting to settle and to negotiate cleanups. Perhaps they have not done so as effectively as they should, and I think that they are concerned about two things.

One, what is the real extent of the cost of cleanup? and two, are they going to be subjected to criticism for settling, if they settle for something less than what someone subsequently determines to be the fair and appropriate cost for a particular settling defendant.

Senator SPECTER. Have you tried to settle cases with them, Judge Renfrew?

Mr. RENFREW. I have not personally, sir.

Senator SPECTER. How about your experience, Mr. Frost? Have you tried to settle cases with EPA?

Mr. FROST. Yes.

Senator SPECTER. How have you done?

Mr. FROST. It has been a long and difficult process, largely because of the factors Judge Renfrew was just referring to. I think the EPA has been a little scared of its shadow when it comes to settling with industrial parties, but——

Senator SPECTER. Have you settled cases with them?

Mr. FROST. That is right, but the cases I have worked on have ultimately wound their way to settlement; and once you are able to get over some of the procedural obstacles, particularly being able to gather the responsible parties together into a coherent settlement group, then it is possible to deal with EPA on a rational basis.

I certainly would not have any blanket endorsement, or blanket condemnation of the bureaucratic conduct at EPA.

Those people are trying to do their job as they see it but they certainly could use, to ease their job, an explicit nod by Congress that it is OK to fund an orphan share. That has been a real sticking point.

It would be within the law but they are afraid of getting hammered up here on the Hill, and if you put approval in a statute it would help a lot.

Mr. MOTT. I settled cases, too, Senator. I do not mean by my comments to suggest that it never happens. Frankly speaking, though, I generally advise clients, and I will tell the committee, you are generally better off as a private party just going out and doing the work.

That we have had cases where we have just gone out and voluntarily started doing the remedial action and have moved faster than the EPA settlement process. If that moots EPA's ability to have a consent decree, so be it. But I just illustrate that to say that there is something in these policies, and the comments made by Mr. Frost and Judge Renfrew I agree with, that it is largely the political climate that has evolved, that has made EPA so afraid to sign or agree to anything, and none of the things in the NAM position that I described are talking about releasing parties.

We are just simply saying we will do the studies, or we will sign the consent decree, and we will agree to implement a remedy that we select, that EPA agrees with, and if there is a disagreement we will go to a Federal judge to work out what the details of the disagreement are.

I think that is a very fair even-handed way. We are not talking about getting any sweetheart deal or industry getting any release early in the process if they do not earn, or by virtue of the work they have done or anything else.

So I think it is very, very clear, there is something about the process though that is impeding settlements and is restricting the ability of private parties to get more work done with EPA approval.

Senator SPECTER. Do you have a concluding comment, Mr. Frost?

Mr. FROST. I was going to say that another stumbling block which I think is going to become more important is the problem of secondary site responsibility or liability, because to the extent EPA wants the responsible parties to carry this stuff away to another dump site, and still be on the hook without a release and subject to contribution actions there at some later time, that is a very material deterrent to getting remedial settlements with EPA. I think that Congress could do something in S. 51 about that problem.

Mr. JONES. Senator, could I ask Mr. Frost if he is talking about settlements where the parties have agreed to take 100 percent of the cleanup cost?

Senator SPECTER. Yes, you may.

Mr. JONES. Now the *Chem-Dyne* case, I mean is that not what you are talking about?

Mr. FROST. That is right.

Mr. JONES. You settled that because you agreed to do a hundred percent, right?

Mr. FROST. The Government, despite their settlement policy, would not shoulder any orphan share, and the settling parties had to go into that consent decree with the idea that if there was a shortfall or some people tried to walk away, that they would have to pick it up on their own, and that was a problem.

Senator SPECTER. Does the Government ever undertake any of the so-called orphan share?

Mr. JONES. No; and that is something you ought to do something about. I mean it is so rare, it certainly is not a prevailing policy there, and that is important.

Senator SPECTER. Does anybody have anything you would like to add before we wrap this panel up?

Mr. JONES. I would just like to add, there was a great deal of interest in the settlement approach or mandatory apportionment recommended by Congressman Breaux, and I would simply have to tell you that that alone would not be adequate to bring the insurance industry back into the market to write environmental coverages.

Senator SPECTER. Thank you very much, gentlemen. We appreciate your being here. There will be some questions submitted to you by Senator Thurmond, the chairman of the committee, and by some other members, and we would very much appreciate your responses to any such questions submitted for the record. We appreciate your being here.

I would like to call now the General Counsel, Ann Powers for the Chesapeake Bay Foundation.

STATEMENT OF ANN POWERS, GENERAL COUNSEL, CHESAPEAKE BAY FOUNDATION

Senator SPECTER. We are glad to have you here. Do you have any prepared testimony to submit?

Ms. POWERS. Senator, I apologize for not having any prepared testimony. Unfortunately we did not receive——

Senator SPECTER. Do not apologize. If you do not have any, that is fine. I just wanted to determine that.

Ms. POWERS. Well, we did not receive notice of the hearing until Saturday and so I am afraid we did not have time to actually prepare any.

Senator SPECTER. Well, we are pleased to hear from you however you may wish to proceed.

Ms. POWERS. Thank you. Senator, for the record, my name is Ann Powers. I am general counsel of the Chesapeake Bay Foundation.

The Foundation is a private non-profit organization dedicated to protecting the resources of Chesapeake Bay. We are interested in protecting those resources in a number of fashions. We have education programs. In addition, when necessary, we litigate, frequently under the citizens' suit provisions of the various statutes. We are interested in hazardous wastes as they affect the Chesapeake Bay and its watershed.

I might add, for background, that I have been general counsel for a year. Prior to that I was with the U.S. Department of Justice. I spent 10 years there, the first 5 in the U.S. Attorney's Office handling criminal prosecutions and general felonies, matters of that nature, and then with the lands division of the Department of Justice.

I was an enforcement attorney in the lands division handling EPA environmental enforcement cases. In that capacity I dealt with certain Superfund cases.

I have the, I suppose, distinction of being the attorney to try the first CERCLA 106 case to actually go to trial, and participated in other cases including some major settlements, particularly the *Petro Processors* case in Louisiana, which resulted in what was, at that time, the largest settlement yet achieved.

I am certainly not an expert in either the hazardous waste or the Superfund area, but I believe that I can give the committee perhaps a different perspective on a couple of these issues.

The two I am interested in particularly today would be citizen suits and the joint and several liability question.

As for citizen suits, it is clear that Congress has recognized the need and the value of such actions. They are included in a number of the environmental statutes, in the Clean Water, the Clean Air, and of course have been most recently included in the RCRA statute. They are a very important complement to Government action. We do not, by any means, delude ourselves that we can be prosecutors and enforcers of the law.

We simply are there to try to make sure that the Government has not overlooked cases that are important. In this respect I would like to say that we believe that the present bill, which does contain a citizen suit provision, is inadequate.

There is no cause of action for citizens to bring an imminent substantial endangerment suit. I do not believe they will be able to sue for reporting failures.

If they do intervene in an EPA suit on those limited areas where they can sue, they have certain restrictions on that intervention.

We think that there should be a full right to bring an imminent substantial endangerment action at least.

It is the type of a case where it would be extremely important to have citizens able to bring suits. I do not believe that Judge Renfrew was accurate, when he said that citizens around a site could now sue, at least not under Federal law.

So that a citizen has no cause of action under 106 for an imminent substantial endangerment. We believe that they should.

Senator SPECTER. When you were in the Enforcement Division, did you think it was necessary to have a right for citizens to bring suits?

Ms. POWERS. At that time, it was not the policy of the Department to support those actions. I do not believe they are supporting this particular citizens' provision.

Senator SPECTER. When you were in the Department, citizen suits could not be brought?

Ms. POWERS. That is correct. Well, not under 106, nor at that time under RCRA.

Senator SPECTER. Do you think it was necessary that citizens would have the right to bring suits, when you were in the Department?

Ms. POWERS. Personally, yes; professionally, no. I accepted the Department position.

Senator SPECTER. That is a good answer. Two good answers.

Ms. POWERS. I think they can, in instances, be very important. They can put pressure on the Government that might not otherwise be there, to hold out for a good result in a case or for a good settlement, and so they can in fact serve very good purposes.

Generally the criticisms on——

Senator SPECTER. On the citizen suits, as the statute currently contemplates it, can the citizen bring the suit just as if the citizen were the Department of Justice or the Environmental Protection Agency?

Ms. POWERS. Well, generally under citizens' suits, that is the idea. You serve as an attorney general, private attorney general.

Senator SPECTER. Under some statutes for replacement of prosecuting attorneys, there has been a standard which enables a private citizen to come forward and petition the court for leave to institute such a suit as a private attorney general, or a private prosecutor, on a showing of a failure of the prosecutor to act, or a refusal to act, or some abuse of discretion.

So that under some statutes, in some States under criminal prosecution, which is a form of an enforcement proceeding, a private citizen may initiate an action but there has to be some threshold showing that the prosecutor is not doing his job.

Do you think that such a standard would be more realistic than permitting the citizen, complainant, or the citizen prosecutor to come in just carte blanche, and start any suit that the citizen complainant wished to start?

Ms. POWERS. Senator, were those criminal types of statutes?

Senator SPECTER. I am talking about criminal cases, yes.

Ms. POWERS. Well, I think the standard may be different in criminal cases. Certainly you do not——

Senator SPECTER. The standard is definitely different in criminal cases. But the question I posed goes to a similar situation where you have a public official charged with the responsibility of enforcing an act, which is what you have with the EPA or the Department of Justice. It is very much the same as having a district attorney, or a State's attorney responsible, or a U.S. attorney responsible for enforceing a criminal law.

Ordinarily it is solely up to the discretion of the public official, and we have that in our laws generally because we have public officials to carry out a public function.

But there has been some relaxation of that, where it is found in a variety of circumstances, treble damage actions, for example, in antitrust cases.

But on the specific statutes that I am referring to, there was an exception, where there could be a citizen's complaint, but first there had to be a showing that the public official had not done something that the public official should have done.

You have to satisfy a judge that something more is involved than just a frolic of a private citizen. I am just wondering if some threshold hurdle might not be wisely presented, and I do not know.

Ms. POWERS. Well, certainly, if citizens were to be given the right to pursue criminal enforcement under RCRA or the Water Act, or others, then I think that we might well wish to consider some type of threshold because I really think there are very distinct differences with the criminal system. We are talking about somebody's liberty.

As a former prosecutor, I can certainly see a distinction there. I do not think that it is necessary in citizen's civil actions because generally you are suing for some type of injunctive relief, and the lawyer who is handling the case hopefully will be a lawyer who is skilled in presenting such cases.

Senator SPECTER. By the same token, where you have an enforcement agency, and you really look to the enforcement agency, as we do under existing law, to do the job of enforcing, you are saying let's give the citizen a right to come in, essentially because the public enforcer is not doing the job for one reason or another. Lack of resources.

And ordinarily, I suppose, there is not even a requirement that the citizen write to the EPA or the Department of Justice and say, "Bring the suit within 30 days or I will."

Ms. POWERS. There is a provision. There is a 90-day notice provision patterned on other citizen suits.

Senator SPECTER. Is there?

Ms. POWERS. So that when a citizen's group wishes to bring an action, they must give notice to the potential defendant, the United States, and generally to the State, too, that they do intend to do that.

Senator SPECTER. So that the public official can bring the suit and preempt the citizen?

Ms. POWERS. Exactly. There is also a provision which says that if the Government is diligently prosecuting an action already, then the citizens may not bring their own action.

So those two provisions I think do give the kind of safeguards that you would be interested——

Senator SPECTER. And you would not think that the citizen should have to pass any sort of a threshold, show some inaction or inappropriate conduct on the part of EPA, or the Department of Justice?

Ms. POWERS. I think that would go against the basic intent of Congress in establishing these provisions, at least to help——

Senator SPECTER. Now wait 1 minute. Congress has not expressed an intent yet, has it?

Ms. POWERS. Not on this particular provision, Senator, but certainly——

Senator SPECTER. That is what we are trying to figure out here, what our intent is.

Ms. POWERS. Certainly in the case of other citizen suits——

Senator SPECTER. We are trying to figure out if we have a mens rea in this instance. You may proceed.

Ms. POWERS. The objections that have been raised to this—I believe I have touched on some of those—include claims that they will interfere with cleanups, but we believe that in fact it will actually assist the agency.

You should recollect that these are suits against—what we are asking for is a suit against the polluter, against the company rather than a suit against the agency.

We believe that this will provide an incentive to the agency to appropriately pursue the remedies in these cases and that it will assist by supplementing its resources.

As I said, we are not interested in taking over the work of EPA or the Department of Justice.

As for strict, joint and several liability, as it is called, I suppose I would like to just make sure first that I am clear here, that the strict liability portion of that is simply the standard. Strict is the standard by which these suits are to be judged.

Joint and several is the scope of liability, and it is the joint and several part of it that concerns me. This has come under severe attack and I think that is probably not surprising since it is really one of the most potent weapons that the Government has in its arsenal for cleaning up hazardous waste sites.

The joint and several liability provision brings companies to the table and achieves cleanups. It makes good sense from a case management perspective. I was not here Friday, but I am sure that both the Department and the Agency——

Senator SPECTER. Pardon me. Are you close to concluding your testimony?

Ms. POWERS. Yes, I am—testified on this issue. I know there has been a great deal of discussion about apporticnment being the fair way to handle these cases. Frankly, I have dealt with cases of this nature, and joint and several liability is a very important tool.

When you speak about apportionment as if it were some mechanical test that could be applied, I think we have to keep in——

Senator SPECTER. Is anybody proposing taking away joint and several liability?

Ms. POWERS. Well, certainly it is my understanding that other witnesses have questioned joint and several liability.

Mr. Jones, I believe from the insurance company, felt that it was something that should be removed from——

Senator SPECTER. And you think it is an important weapon?

Ms. POWERS. We certainly do. We believe that apportionment will not work, for a number of reasons. First of all, the cases are complicated partly because the sites are very complicated and there are an incredible number of parties involved in these cases.

It is easy to say that if somebody put 100 barrels there at a site, and somebody put 900, then maybe you could apportion it, you have a divisiable injury, perhaps, where you can actually figure out who pays what.

But most of the time people put in these barrels, the barrels have mouldered, they have contaminated ground water, you have a mixture of chemicals, and in one particular case which I handled apportionment was the only real issue that held up, caused the problems.

And the defendants could not agree among themselves how to apportion the liability. Because of the nature of the chemicals. They disagreed over the toxicity of the chemicals, over the volumes that they produced.

Senator SPECTER. Miss Powers, I think I have your point on joint and several.

Ms. POWERS. Senator, thank you very much for the opportunity to testify. We urge that the committee adopt a strong citizen suit provision, and keep joint and several liability intact.

Senator SPECTER. Thank you very much, Miss Powers. That concludes our hearing.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

APPENDIX

June 3, 1985

The Honorable Strom Thurmond
5972 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The undersigned organizations, representing thousands of businesses, wish to bring to your attention our serious reservations with the "community right-to-know" provision of the Superfund reauthorization bill reported by the Senate Environment and Public Works Committee (Section 106 of S. 51). While we support the need for emergency authorities to be able to provide informed response to the potential dangers posed by the release of hazardous substances, we believe that the provision in S. 51 goes well beyond what is necessary, and has the potential to impose significant and needless hardship on many enterprises, especially small businesses.

The provision would require manufacturers, or those who store over 6000 kilograms (13,200 pounds) of hazardous substances and have ten or more full-time employees, to comply with extensive and redundant information-collection requirements. The provision would also require the distribution of that information to state and local regulatory agencies, emergency response and medical officials, public libraries, and the President of the United States. A principal objective of the provision is the creation of an inventory ("mass balance") for all hazardous substances that move in commerce or are released into the environment.

We seriously question whether the provision will achieve its stated objective and whether, in fact, such an inventory has any place in a remedial hazardous waste cleanup program.

First, much of the information required would not be usable by, and in all likelihood would be confusing to, emergency response authorities. For example, data on the stack emissions, fugitive emissions, and wastewater discharges to surface water and publicly owned treatment works would be required to be distributed to emergency response authorities. Apart from the burden of compliance with such a requirement, we cannot conceive of any useful purpose to which emergency authorities could put such information.

The collection of a large body of statistical information to achieve a "mass balance" inventory of hazardous substances is an unnecessary overlap of existing regulatory programs. With regard to hazardous wastes as a case in point, the committee report accompanying the provision notes that "the inventory will ... begin to track substances that may be the constituents of future Superfund sites." With the "cradle-to-grave" hazardous waste manifest system already required by the Resource Conservation and Recovery Act (RCRA), the provision's additional inventory requirements for hazardous wastes are unjustified and potentially counterproductive.

The inventory envisioned will require time-consuming recalculation of data already collected in different form to comply with other environmental laws and will impose additional costly monitoring and estimation which will not significantly improve the protection of public health and the environment. It is not only RCRA requirements that are being duplicated and expanded by this provision. Information on wastewater discharges (required by the inventory) is already collected under programs of the Clean Water Act, and the proposed form, as applied to manufacturers, replicates the information collected under the Toxic Substances Control Act inventory, which EPA is currently updating.

Second, the provision appears to contain technical deficiencies. For example, it would require the submission of data based upon monitoring over a twelve month period within six months of enactment. It may be impossible for some companies to comply with this requirement. Despite such apparent defects, the provision would be exempt from the congressionally established checks and reviews intended to reduce the burden and costs of such inappropriate information-collection requirements.

Third, by permitting the states to require "equivalent or different" information, it is highly unlikely that the inventory intended by the provision would have a consistent basis for analysis. The differing state forms would, however, impose a significant burden on small businesses involved in interstate commerce.

Fourth, the form itself is based only on the experience of one state, New Jersey, whose program was the subject of successful legal challenges. It does not take into account the programs or experience of other states.

Fifth, wholesale and retail operations would also be potentially subject to the requirements of the provision. Many items in a wholesale warehouse, distribution center, or retail establishment are in the form of consumer products. Identifying "fugitive emissions" or determining the "mixture" percentages on widely varying and frequently changing inventories would be infeasible for these operations.

We strongly support the idea of providing emergency authorities with the requisite information to respond to the potential dangers of hazardous substances. We also believe that communities should have more extensive and better information about the risks of chemicals. We do not believe that the "mass balance" inventory proposed by the provision is a workable way to meet a community's "right-to-know."

Sincerely,

The American Furniture Manufacturers Association
Automotive Service Council Inc.
Automotive Services Industry Association
Chemical Specialties Manufacturers Association
Independent Lubricant Manufacturers Association
Institute of Industrial Launderers
International Fabricare Institute
Man Made Fiber Producers Association
Metal Finishing Suppliers Association
National Association of Chemical Distributors
National Association of Manufacturers
National Association of Metal Finishers
National Association of Printing Ink Manufacturers
National Cotton Council of America
National Independent Dairy Foods Association
Printing Industries of America
Rubber Manufacturers Association
Synthetic Organic Chemical Manufacturers Association

United
States
Steel
Corporation

JAMES L. HAMILTON, III
MANAGER
GOVERNMENTAL AFFAIRS

818 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006
202/857-0300

June 4, 1985

The Honorable
Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We were very pleased to learn that S. 51, the reauthorization of Superfund, has been referred to the Judiciary Committee. The business community is quite concerned with the liability scheme of Superfund -- a combination of statutory provisions, case law and settlement policy. We believe this scheme can be fine-tuned to reduce transaction costs and to facilitate greater voluntary participation in remedial actions at Superfund sites.

U. S. Steel Corporation has endorsed the enclosed position adopted by the National Association of Manufacturers. This broad-based Association representing business interests is prepared and has requested an opportunity to testify at the Judiciary Committee hearing scheduled for June 7, 1985. We hope their request will be granted so that the interests of generators of hazardous waste, potentially responsible parties at Superfund sites, can be represented during the hearing. The NAM witness would be Randy Mott, a practicing attorney especially well-qualified to testify before your Committee. He has represented major corporations in Superfund negotiations, served on the Advisory Committee for the Office of Technology Assessment Superfund Strategy Report and is the Chairman of the Annual Practicing Lawyers Institute -- Hazardous Waste Litigation Conference.

We hope the NAM request to testify can be accommodated. More importantly, we urge the Judiciary Committee to consider each of the seven points outlined in the attached NAM Position Paper.

Sincerely,

James L. Hamilton III

Attachment

cc: All Members of the Judiciary Committee

NAM POSITION ON SUPERFUND LIABILITY SCHEME

The current liability scheme of Superfund is a combination of statutory provisions, case law and settlement policy. Ironically, this scheme may be a significant factor inhibiting greater private sector voluntary participation in remedial actions at Superfund sites. This scheme may also be responsible for the significant transaction costs incurred by government, public and private parties.

The NAM supports EPA's need and capability to respond to emergency situations at Superfund sites without procedural impairments. The National Contingency Plan provides for expeditious emergency action by EPA when necessary to protect public health and the environment. Enjoining or restricting EPA's ability to respond to imminent threats is not at issue.

Most EPA remedial actions are long term by definition. They are undertaken after emergency action has been completed. Remedial actions are defined by the Remedial Investigation - Feasibility Study (RI/FS) process that may take 36 to 48 months to complete. The RI/FS process is deliberate, not immediate and is immensely complex in nature. It is the Superfund liability scheme associated with the RI/FS process and the implementation of the remedy that is at issue.

The number of abandoned hazardous waste sites that will require remedial actions to protect public health and the environment has been estimated by EPA to exceed 2,000. Some estimates of sites that will ultimately be added to the National Priority List (NPL) are much larger. Additionally, non-NPL sites may also require remedial action. Given the large total number of sites that may be addressed by the Superfund program, progress in completing remedial actions will be enhanced by incentives for, and the elimination of obstacles to, greater private sector participation.

There have been estimates that transaction costs, including consultant and attorney fees, generated by Superfund could exceed $5 billion by 1990. Certainly, transaction costs have been found to be exceedingly high -- sometimes greater at specific sites than the cost of cleanup. Any effort to reduce transaction costs would enable the Superfund program to be conducted in a more cost-effective manner and would provide incentives for early settlement and greater private sector participation.

NAM supports modest modifications to the current Superfund liability scheme to facilitate private sector involvement and to reduce transaction costs. These changes, combined with full public disclosure and participation, should expedite long term remedial actions and reduce costs. Modifications supported by NAM do not significantly change the liability provisions of current Superfund law but rather fine tune those provisions to eliminate obstacles and provide incentive for early settlement by potentially responsible parties.

Specifically, NAM supports the following modifications to the current liability scheme of Superfund:

- PUBLIC PARTICIPATION -- The public, especially the affected community, has a need to know all relevant facts concerning the identification, investigation, and remedy for a Superfund site. Meaningful public hearings with adequate comment periods, publication in local newspapers and other reasonable means should be undertaken to keep the public informed and involved in specific Superfund site developments. EPA should have the statutory responsibility to encourage full public participation. Reports and data used by EPA should be on the record and published or at least available to all affected interests for review and possible challenge.

- POTENTIALLY RESPONSIBLE PARTIES -- EPA should be required to made a good faith effort to identify all PRPs. PRPs, once identified, should be formally notified by EPA. Supplementing the individual EPA notice to all PRPs, the full list of PRPs should be published and provided to all other PRPs. As new PRPs are identified, EPA should formally notify them and other PRPs. Where EPA has notified a PRP, that PRP should be given an opportunity to examine documents in EPA's possession relative to that PRP's involvement at the site.

- TRIAL BIFURCATION -- The order of proof in Superfund litigation can affect transaction costs and the viability of out of court settlement. Where litigation is required, EPA should settle issues concerning the remedy first, before adjudication of liability. PRPs are naturally reluctant to settle on liability before the remedy is identified and costs are estimated. Further, PRPs are less likely to make an issue of liability if remedial costs are known and their share of the costs can be estimated.

- DISPUTE RESOLUTION -- A major obstacle to settlement is EPA's refusal to incorporate acceptable dispute resolution provisions in consent decrees. An expedited mechanism to resolve disputes under consent decrees is needed. Disputed issues should be resolved by the preponderance of the evidence. It is not desirable for EPA to insist on an "EPA is always right" or an "EPA's decision is final" clause to be included in Superfund settlements. In fact, EPA is not always right and affected interests may not agree with EPA. Local government, public and private parties should have the ability to raise issues and have their positions considered in any dispute with EPA. The issues should be decided in District Court by a preponderance of the evidence.

- REMEDIAL INVESTIGATION/FEASIBILITY STUDY -- Private parties should be encouraged to perform RI/FSs and to perform them without a commitment to implement the remedy that is ultimately selected. The RI/FS identifies problems at a specific Superfund site and the remedy to resolve those problems. PRPs should have incentive to perform RI/FSs consistent with the National Contingency Plan and the EPA RI/FS Manual -- providing quality assurance with EPA protocols. Currently, EPA normally insists that the PRP commit to the remedy EPA selects as a condition for a PRP RI/FS. By encouraging and unleashing private sector resources, many more RI/FSs can be undertaken than will be the case if all are done by EPA. Also, where PRPs conduct the studies, they are more likely to agree to the selected remedy. Again, all aspects of a privately conducted RI/FS should be subject to EPA initial, interim and final approval to the extent feasible. Requiring initial agreement to the final remedy destroys incentive for PRP cooperation.

- DE MINIMIS GENERATORS -- Provisions similar to those of the Uniform Contribution Among Joint Tortfeasors Act should be adopted to provide *de minimis* generators with the opportunity to settle and pay at the earliest appropriate time. *De minimis* generators cannot justify transaction costs that normally would exceed their fair share of remedial costs. Special consideration should be given to *de minimis* generators so that they can quickly discharge their financial responsibilities at a specific site without the need for full representation or participation in all settlement and remedial activities at the site.

NAM recognizes that hazardous waste generators have a responsibility to ensure that the disposal of their wastes pose no significant threat to human health or the environment. Nevertheless, the current liability scheme of Superfund erects obstacles to and inhibits voluntary private sector participation in remedial actions at Superfund sites. These obstacles can be reduced, and incentives provided by adoption of the points noted above.

- CONTRIBUTION -- The Superfund statute is silent and case law is mixed on the question of contribution. The right of one liable party to seek reimbursement from another is not defined under current Superfund law. This uncertainty inhibits early PRP settlement and should be reduced to provide incentive for constructive participation. PRPs should be allowed to elect a fair-share settlement and be protected from future third-party suits by PRPs who are not a part of the initial settlement. This can be done by adopting provisions similar to those of the Uniform Contribution Among Joint Tortfeasors Act. PRPs, who settle for more than their fair share of remedial costs to facilitate settlement, should be allowed to initiate third-party suits under Superfund against non-settling PRPs to recoup that portion of the remedial costs exceeding their fair share. There should be no restrictions on this type of third-party suit.

ROBERT T. STAFFORD, VERMONT, CHAIRMAN

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LEE O. FULLER, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

June 5, 1985

The Honorable Strom Thurmond
United States Senate
SR-218 Russell Building
Washington, D.C. 20510

Dear Mr. Chairman:

We understand that the Committee on the Judiciary will soon consider legislation reauthorizing the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). We commend your interest in this critical legislation.

We are concerned, however, about any action which would propose to alter or eliminate Section 138 dealing with citizen suits. Any changes to this provision could substantially undermine our efforts to improve Superfund administration and effectiveness.

Although we recognize that the Judiciary Committee's jurisdiction is limited to how this provision may affect the courts or relates to claims against the United States, we would like to review the factors behind the citizen suit provision.

Citizen suit provisions have been an integral component of environmental legislation since the Environmental Protection Agency was created by Congress. Citizen access to the courts is provided for in the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, Safe Drinking Water Act and the Noise Control Act. In other words, every major piece of environmental legislation except Superfund contains this provision.

As reported by the Environment and Public Works Committee, a citizen suit provision has been extended to Superfund. This new authority, modeled on the citizen suit provisions of the Clean Air, Clean Water, and Solid Waste Disposal Acts, allows individuals to bring actions in federal court against private parties to abate violations of CERCLA, and against federal officials to force performance of non-discretionary duties under the Act.

Citizen suits have become an important and highly visible element of environmental enforcement activity. In August, 1983, then Administrator Ruckelshaus asked EPA's Office of Policy, Planning and Evaluation to conduct a long-run, integrated review of EPA's principal statutory authorities. The Administrator stressed that since the conception of these laws, a great deal had been learned about how well EPA programs control pollution, about the relationship between pollution in different environmental media, and about the trade-offs between environmental regulation and other values. The purpose of this introspection was to review the experience of the agency and to "assess afresh" whether the agency's existing authorities provide the best approach to promoting health and environmental protection -- or whether the agency can do better.

One of the first studies undertaken as part of this review was a study of citizen suit provisions. The purpose of this study was to review how these "private attorney's general" provisions have actually worked. The Environmental Law Institute completed a citizen suit study for EPA in September, 1984. We have enclosed a copy of this study for your review.

A major conclusion of this review was that the system of citizen enforcement is currently operating as Congress intended: to provide (1) a goad and (2) an alternative to governmental enforcement. This study determined that since 1978, 349 citizen enforcement actions under the six major environmental laws were taken. Only 189 actions actually resulted in litigation.

The main complaints against citizen suit provisions are that they (1) interfere with government enforcement and (2) focus on de minimis violations. The ELI study conducted for EPA did not substantiate either allegation.

The federal enforcement officials interviewed for the ELI study expressed general support for citizen enforcement. EPA headquarters and regional enforcement staff interviewees said that a large portion of citizen notices addressed violations that either were worthy of agency action, but had escaped EPA attention or, though not on EPA's priority list were appropriate subjects of enforcement actions. None of the governmental enforcement personnel interviewed reported a general tendency for citizen groups to pursue trivial violations.

Congress intended for citizen suits to act as a goad for better agency enforcement. Citizen actions seem to be working well in this regard. From 1981 through 1983, there was a general decline in the number of enforcement actions initiated by EPA. In response to this decline, the number of citizen suits increased. EPA's enforcement activity began to increase in the Spring of 1984. Although only a few of these cases have been settled, it appears the scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to act as a general deterrant. In other words, they complement agency actions to meet environmental goals.

It is both prudent and responsible public policy to extend citizen suit provisions to CERCLA. The mismanagement of the CERCLA program during its initial years is legendary. The scope and extent of the hazardous waste clean-up problem facing the nation continues to grow. Citizen enforcement actions to prod hazardous waste clean-ups can act as an important complement to EPA efforts.

Specifically, the citizen suit provision in S. 51 provides a right for citizens to sue in federal court to enforce standards, regulations, conditions, requirements and orders under the Act and to seek the performance of non-discretionary duties. A number of safeguards have been incorporated in the provision to assure that it will complement, and not interfere with, federal regulatory and enforcement programs. A citizen suit may only be initiated 90 days after the President, the state in which the alleged violation occurred, and the alleged violator have been notified. If the United States or a state has commenced and is diligently prosecuting an action under this Act or the Solid Waste Disposal Act, an action under this provision cannot be filed. Although 90 days is not sufficient time for the agency to conduct all studies necessary to initiate an enforcement action, current experience, this period of time should be sufficient for the agency to conduct an investigation satisfactory to the private parties. EPA and the private parties will then be able to work out a mutually acceptable way to proceed.

An additional safeguard to insure against suits not in the public interest is a clear right of intervention for the Administrator. For example, the Administrator may intervene in an action and seek from the courts restrictions or conditions upon the citizen suit, in order to assure that the means of prosecution and the relief sought are in the public interest.

At the same time, those persons living in close proximity to a hazardous waste site which is the subject of a government initiated action will be able to intervene as a matter of right unless the President or the state can demonstrate that they are adequately representing their interests.

We believe that in its totality the new citizen suit provision adequately balances the need for agency flexibility in meeting the objective of CERCLA with the strong participatory tradition embodied in our other environmental statutes.

We believe that providing individuals the ability to bring action in federal courts is basic to the needs of communities where genuine threats are posed by abandoned hazardous waste sites. Furthermore, experience has demonstrated that such a provision will encourage increased voluntary compliance and clean-up by responsible parties. This provision can only improve our efforts to provide effective and expeditious remedial action at hazardous waste sites around the nation.

We urge the Committee on the Judiciary to consider the importance of this provision to a continued hazardous waste clean-up effort during Committee consideration of the Superfund reauthorization legislation. We have enclosed a copy of the recent EPA sponsored review of citizen suit provisions for your personal review.

Sincerely yours,

Max Baucus
MAX BAUCUS

Gary Hart
GARY HART

Enclosure

THE DEPUTY SECRETARY OF ENERGY
WASHINGTON, D.C. 20585

June 5, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for Department of Energy views on S. 51, the "Superfund Improvement Act of 1985". The Department of Energy strongly supports the Administration's legislative proposal for the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). DOE is committed to protecting the health and safety of employees at DOE facilities and providing protection to the environment. In addition to CERCLA, the Department is working to meet the requirements of other applicable laws, such as the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Atomic Energy Act, and many state environmental laws.

Specifically regarding S. 51, DOE strongly opposes sections 137 and 138 and urges that they be deleted.

Section 137 of S. 51 would impose mandatory schedules for the undertaking by Federal agencies of preliminary assessments, remedial investigation and feasibility studies, the mandatory ranking of Federal sites on the National Priorities List, the entering into of clean-up compliance agreements between the responsible Federal agency and EPA, and the start of remedial action. Section 138 of S. 51 would authorize citizen suits "against any person, including the United States and any other governmental instrumentality or agency... who is alleged to be in violation of any standard, regulation, condition, requirement or order which has become effective pursuant to this Act."

DOE believes that clean-ups should be accomplished expeditiously and is continuing its activities with this as a primary goal. However, the various schedules imposed by S. 51 are not reasonable and simply do not reflect the realities of agency funding and other Congressionally imposed requirements. For example, the agency is not exclusively in control of the operation of the normal two-year budget cycle, the required interagency and public review, nor additional delays in obtaining appropriated funds from Congress. Add to this the uncertainties in the time needed to select qualified clean-up and construction contractors through competitive procurement in accordance with Federal acquisition and procurement regulations, and the one-year or longer time normally needed to collect and analyze representative water, soil and air samples. All the above are subject to delays beyond the control of the responsible agency and can directly cause an agency to miss deadlines and, therefore, subject the agency to a citizen suit. Moreover, the remedial investigation and feasibility studies may identify additional releases of hazardous substances at a site which in turn require laboratory analyses and engineering work before remedial action can even begin. This could also cause an agency to miss its deadline.

The cumulative effect of the statutorily imposed schedules and the extremely broad citizen suit provision contained in S. 51 could lead to ad-hoc court-imposed priority setting for the clean-up of individual Federal facilities. These court decisions are likely to interfere with DOE's ability to comprehensively plan, prioritize and implement, on the basis of environmental, health and safety risk assessments, environmental compliance projects under CERCLA and other environmental laws. As a result, overall environmental compliance could suffer.

DOE believes that the most appropriate way to identify and clean up individual sites is through a dedicated program to achieve these objectives. Funding and schedules to implement this program would best be accomplished through the normal operation of the budget process. Citizen suits authorized under section 138 could create significant problems in that individual courts would review Federal agency actions at individual sites, and could issue orders with respect to those sites without necessarily considering the need for Federal agencies to move on a more expedited basis to undertake clean-up activities of a higher public health and safety priority at other sites. Those other sites would not be under consideration by that particular court. If the bill were to be enacted, DOE consequently may be forced to delay or defer work on CERCLA sites or on other sites where high priority work is in progress to meet requirements of the Clean Air and Clean Water Acts, even though the risk to public health and safety in these other areas may be judged to be greater.

In conclusion, DOE is committed to a sound environmental clean-up program and believes that the provisions in S. 51 modified as we have proposed will accomplish that goal. Should you have any questions regarding this important matter, please do not hesitate to contact me.

The Office of Management and Budget advises that it has no objection to the submission of this report for the consideration of the committee from the standpoint of the President's program.

Yours truly,

Danny J Boggs

Danny J. Boggs

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Honorable Strom Thurmond
U.S. Senate, SR-218
Washington, D.C. 20510

Re: S.51-Superfund -- Clean-up Contractors' Liability

Dear Senator Thurmond:

We are concerned that even in the face of the Senate's efforts to reauthorize the Superfund legislation prior to its expiration in September, the actual clean-up of hazardous waste sites may come to a halt. This is because the environmental engineering contractors which conduct remedial site investigations and oversee and conduct actual site cleanup activities have been advised by the specialty and casualty insurance carriers that insurance coverage for these activities will no longer be available.

The insurance carriers have advised us that due to the joint and several liability provisions of Superfund, coupled with the trend in state and Federal court decisions, two distinct liabilities exist which are not related to whether the contractor acted negligently or responsibly. Because of this, the liabilities are seen as being unquantifiable and hence uninsurable.

The two liabilities are: (1) because of their involvement with the hazardous waste site, under the terms of joint and several liability now in the Act, response action contractors could be held liable for future cleanup costs regardless of whether they had exercised due care, strictly adhered to contract specifications, or to applicable laws and regulations. This is because under Superfund's provisions for joint and several liability, contractors may be classified as a responsible party in the event of a future release from the site; (2) In addition, response action contractors could be held liable for third party damage claims which could be filed years after the activities under the cleanup contract have been completed.

We have been advised by our insurers that beginning this Fall, all policy renewals will contain a "pollution exclusion" clause, specifically excluding from coverage any contractor's activities involving hazardous waste. We are advised that if any insurance is made available in the future, the premiums and deductible amounts will directly reflect the insurers' view that the risks are basically uninsurable. If available, any such insurance would be on a "claims made basis" that is, coverage would be available only for the time period for which the insurance is actually available. Such policies would have to be renewed long after the completion of the actual cleanup. Therefore, there is no assurance of coverage for the indefinite period of the potential risk, leaving the policy completely inadequate for response action cleanup contractors. Because the potential liability, in the absence of affordable insurance, far exceeds the assets of the majority of response action contractors, most firms -- if not all -- will most likely prudently cease working on the cleanup of hazardous waste sites.

Our firm, with others, is working with the American Consulting Engineers Council (ACEC), the Design Professionals Coalition (DPC) and other responsible organizations to work with EPA and the Congress to achieve a reasonable solution to this unreasonable situation. Enclosed is a fact sheet on this matter as well as suggested possible legislative language. We urge your support in modifying S.51 to rectify this important problem. If you have any questions, please feel free to call me (429-8951) or Larry Bory of ACEC (347-7474).

Sincerely,

Joan M. Kovalic
General Counsel

Enclosure

DESIGN-CONSTRUCTION INDUSTRY COALITION

June 5, 1985

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2221 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Dingell:

The undersigned Superfund clean-up Architect-Engineer and construction contractor organizations wish to express our common concerns about liability and contractor selection matters, which we respectfully urge be given consideration during the reauthorization of Superfund.

Specialized response action contractor (design and construction) expertise is vital to respond to the complex requirements of hazardous waste clean-up. None of us are "responsible parties" or "generators of hazardous waste" as defined in CERCLA. Yet, in our traditional roles of assisting governments at all levels with the resolution of these threats to public health, safety and the environment, those involved with clean-up efforts face enormous liability risks. Thus, many of the most competent and qualified companies, whose participation in Superfund is vital in order for the program to move forward at a responsible yet accelerating pace and to achieve the results intended by you and the Congress, are being forced to consider whether they will enter or continue in the Superfund hazardous waste clean-up business.

Discussion of Problems

- Response action contractors currently face two distinct liabilities--liability for future clean-up costs under the present Superfund law and third party liability under the various state laws.
  - -- Under the current Superfund law, response action contractors, despite the exercise of due care and satisfactory performance of contract specifications, could by virtue of their contact with hazardous waste sites be included in the definitions of owner, generator, or transporter and subject to the strict, joint and several liabilities of Superfund.
  - -- Liability for third party damages under state law adds additional risks which continue years after contract completion, potentially exceeding both the contract amount and the company's net worth. Of particular concern is the potential application of strict or absolute liability--that is, liability without fault--for these damages.
  - o Numerous firms are being adversely affected by increased premiums, unacceptably high deductibles, or cancellation of insurance upon the carriers' learning of intent to participate in such activities. For design firms this impacts their professional liability as well as general liability policies. Many construction contractors are currently unable to obtain any insurance. Some specialized insurance companies who provide coverage for design firms have announced there will be no coverage after 1 January, 1986, for hazardous waste activities.
  - o Insurance, if available, will continue to be written on a "claims-made basis," which provides coverage only for claims which are presented to the insured during the policy's stated period. Without assurance of coverage for the indefinite period of potential risk, these policies are completely inadequate for clean-up contractors.

- Firms providing Architect-Engineer and related services are not always selected for contracts and subcontracts through the proven qualification-based Brooks' Law selection procedures.
- Federal Acquisition Regulations may discourage or limit participation by the most experienced firms.
- The already limited capacity of the design/construction industry to respond to both government needs for abandoned sites and responsible party needs for voluntary clean-ups may be further diluted by well-intentioned but unrealistic EPA conflict of interest limitations.

Suggested Solutions

- Superfund should clarify and differentiate the liability of response action contractors hired by EPA, other Federal agencies, the states or industries undertaking clean-up of their own sites from that of responsible parties for Superfund related activities.
- Response action contractors should be removed from the chain of strict, joint and several liabilities imposed by Superfund, and a single standard of liability should be applied to their activities throughout the fifty states.
- Response action contractors should further be held responsible only for their negligent action or inaction as determined by the relevant industry standard at the time of the contractor's conduct.
- Site-specific or other absolute ceilings should be established on the clean-up contractor's liability, including third party claims, for performance of contract activities. That ceiling and a rational statute of limitations are necessary to create a reasonable business risk to encourage response action contractors to carry out these clean-up activities.
- The selection of all Superfund contractors and subcontractors for program management, construction management, architectural, engineering, geotechnical, surveying and mapping and related services should be conducted under the qualification-based procedures required under the existing Federal Brooks' Law.
- In the interest of public safety, health, and welfare it is critical that the entire pool of qualified response contractors be eligible to compete for contracts. Further, Federal conflict of interest restrictions, as applied to response action contractors, should be reasonable to permit the widest availability of clean-up expertise to meet both public and private sector needs and to encourage technology transfer.

Conclusion

We share with you a concern that our nation's hazardous waste problems must be dealt with in a timely and responsible manner. That public need is not well-served if unreasonable liability risks discourage well-qualified response action contractors from participating in this important environmental and public health program or if restraints on competition and inappropriate methods for selecting architect-engineer, geotechnical, surveying and mapping contractors give us performances which are second best.

Representatives of our organizations are prepared to work with you and your staff to produce a sound and responsible Superfund Act which addresses these issues. Our point of contact is Richard L. Corrigan of the Design Professionals Coalition, who can be reached at 393-2426. A list of contacts for all organizations is attached.

Sincerely yours,

American Congress on Surveying and Mapping	Associated General Contractors

American Consulting Engineers
Council

American Institute of Architects

American Society for
Photogrammetry and
Remote Sensing

Associated Builders and
Contractors

Association of Soil
and Foundation Engineers

Design Professionals Coalition

National Constructors
Association

National Society of
Professional Engineers

Attachment

DESIGN-CONSTRUCTION INDUSTRY CONTACT LIST

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M~~r. Brian~~ Connor
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- o Federal policy may discourage participation by the most experienced and capable engineering firms by selection by other than qualifications. In addition the capacity of the industry to respond to both government needs for abandoned sites and industry needs for voluntary clean ups may be restricted by unduly restrictive conflict of interest limitations.

The Solution

- o The Superfund language must clarify the liability of response action contractors hired by EPA, other federal agencies, the states or responsible parties from that of responsible parties for Superfund related activities.
- o The response action contractors should be removed from the chain of strict, joint and several liability imposed by Superfund and a single standard of liability should be applied to their activities throughout the fifty states.
- o Response action contractors should further be held responsible only for their negligent action or inaction as determined by the relevant industry standard at the time of the contractor's conduct.
- o It is imperative that an absolute ceiling be established on the cleanup contractor's liability for release or threatened release of a hazardous substance, pollutant or contaminant. That ceiling and a rational statute of limitations are necessary to create a reasonable business risk to encourage response action contractors to carry out these cleanup activities.
- o The selection of engineering contractors for investigation, design and program management must be conducted under qualification-based procedures for architects and engineers under existing federal law.
- o Federal conflict of interest restrictions as applied to response action contractors should be reasonable to permit the widest availability of clean up expertise to meet both public and private sector needs.

Experienced engineering and construction firms want to be able to participate in Superfund. Response by the Congress will provide more certainty for the specialized insurance industry so that response action contractors can continue to provide their own financial responsibility.

The public of this nation demands that the problem of hazardous waste cleanup be handled in a timely and responsible manner. That clear public need is not well-served by a scheme of liability which discourages response action contractors from participating in this important environmental and public health program.

LIABILITY PROTECTION FOR RESPONSE ACTION CONTRACTORS UNDER SUPERFUND

Specialized engineering, design and construction expertise is vital to respond to the complexity of hazardous waste clean ups. Successful, site-specific investigations and remedial actions are being developed and implemented through the combined efforts of Federal and state agencies and a limited, but growing number of highly specialized engineering firms and construction contractors. These firms known as "response action contractors" however, are concerned that the imposition of liability standards, intended by Congress and states to be applied to the disposers of hazardous wastes, is exposing them to ruinous claims and eliminating the availability of liability insurance to cover their activities on Superfund sites.

The Problem

- Response action contractors currently face two distinct liabilities--liability for future cleanup costs under the present Superfund law and third party liability under the various state laws.

- Under the current Superfund law response action contractors, despite the exercise of due care and satisfactory performance of contract specifications, could by virtue of their contact with the hazardous waste site be included in the definition of the owner, generator, or transporter subject to the strict, joint and several liability of Superfund.

- Liability for third party damages under state law adds additional risks which continue years after contract completion, potentially exceeding both the contract amount and the company's net worth. Of particular concern is the potential application of strict or absolute liability--that is, liability without fault--for these damages.

- Insurance at one time available to handle these risks is currently inadequate, scarce and expensive. Future availability of adequate coverage at any price is in doubt. In fact, specialized insurance companies who provide coverage for these firms have announced there will be no coverage after 1 January, 1986 for hazardous waste activities.

- Future insurance, if available, will be limited to "claims-made" policies, which provide coverage only for claims which are presented to the insured during the policy's stated period. Specific "claims-made" policies would therefore have to be renewed annually long after the completion of the actual cleanup. Without the assurance of coverage for the indefinite period of the potential risk, these policies are completely inadequate for cleanup contractors.

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CONSTRUCTION INDUSTRY QUALITY AMENDMENT

(c) Section 104 is amended by adding the following new sub section at the end thereof:

"(j)(1) Except as provided in paragraph (2), there shall be no liability under this title on the part of any 'response action contractor.' For purposes of this subsection a 'response action contractor' is a person who enters into a contract, subcontract or cooperative agreement with --

"(A) the Administrator or his representative;

"(B) a State; or

"(C) any responsible party

relating to any action authorized under this title, including, but not limited to, a response action plan approved by the Administrator or by the State, to provide any technical assistance, initial or remedial site investigation, feasibility study, evaluation, planning, engineering, design, construction, construction management, equipment, remediation or any ancillary or sustaining services thereto and is not an owner, operator or other responsible person as provided for in Section 107 of this Act.

"(2)(a) The exemption under paragraph (1) shall apply to all losses of a response action contractor related to the performance of any contract, subcontract or agreement except to the extent that such losses are ordinary losses compensated for by such insurance coverages as are deemed appropriate and reasonably available from time to time by the Contracting Officer or his delegee. For the purposes of this section "ordinary losses" do not include losses created by the release of a hazardous substance, pollutant or contaminant generated by or from a facility.

(b) Nothing in this subsection shall provide any exemption from liability for the response action contractor, for liability as the result of gross negligence or intentional misconduct on the part of such response action contractor. For the purposes of the preceding sentence, reckless, willful or wanton misconduct shall constitute gross negligence.

"(3) To protect the health and safety of the public and to assure the selection of technically superior response action contractors, no potential offeror of a bid or proposal for a contract, subcontract or cooperative agreement to be performed and funded under the authority of this Act shall be denied the opportunity to compete for such contracts. Response action contractors and subcontractors for program management, construction management, architectural, engineering, surveying and mapping and related services shall be selected in accordance with Section 541 of Title 40, United States Code. The federal selection procedures or equivalent state requirements shall apply to appropriate contracts negotiated by all governmental agencies designated in this Act or involved in carrying out this Act under Memoranda of Understanding, state cooperative agreements, or other means, and shall be followed by response action contractors and subcontractors.

[Although not included in the original,
liability of response action contractors under state tort
law is substantial and of significant and comparable concern
~~for consulting engineers. The following language~~ is offered
to address that concern and liability.]

"(4) Notwithstanding the provisions of Section 114 of this Act, a response action contractor shall not be liable under any other federal law or the law of any State or political subdivision or common law to any person for any injuries, costs, damages, expenses or other liability, including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury or loss of or damage to property, which result from a release or threatened release of a hazardous substance, pollutant or contaminant caused by such exempt services, provided the response action contractor has not acted negligently as determined by the relevant industry standards at the time of the response action contractor's conduct. In no event shall the liability within the meaning of this subsection for all response action contractors per site exceed the aggregate sum of Ten Million Dollars or such lesser amount as the Administrator shall establish. No suit against a response action contractor shall be commenced after the expiration of five years after the completion of the contract, subcontract or agreement by the response action contractor. Any person retained or hired by a response action contractor to provide any of the services described in paragraph (1) of this section shall have the same exemption from liability provided to the response action contractor.

AMERICAN INSURANCE ASSOCIATION
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(202) 293-3010

June 3, 1985

The Honorable Strom Thurmond
United States Senate
218 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

As you and your colleagues consider the reauthorization of the Superfund law (Comprehensive Environmental Response, Compensation and Liability Act) this year, you should be aware of the problems and failures precipitated by the law's current administrative and enforcement policies.

These problems, outlined in the May 24 article by our president published by the New York Times, are the very reason the insurance industry virtually has stopped writing environmental liability insurance. This situation is not of our choosing. We want to help make Superfund work. We want to be able to provide necessary coverage.

When Superfund was enacted in 1980, we thought we would be able to do so. But the unfair, costly and time-consuming emphasis the Environmental Protection Agency and the U.S. Department of Justice place on litigation made that impossible and forced our member companies from this market.

Please review the operation of the present program and note its failure to achieve even minimal clean-up. We believe you will conclude, as we have, that the law must be totally restructured in order to work as it was meant to work.

Sincerely,

William W. Suttle
Senior Vice President
Federal Affairs

Attachment
cc: James L. Kimble
Melvin L. Stark

AtlanticRichfieldCompany
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Washington, D.C. 20036
Telephone 202 457 6221

James E. Ford
Director
Federal Government Relations

June 6, 1985

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Thurmond:

Atlantic Richfield Company respectfully submits the attached written views on the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act for consideration by the Committee on the Judiciary during its hearings on the judicial issues raised by the reauthorization of the legislation (S. 51) reported by the Committee on Environment and Public Works.

We ask that these views be included in the Judiciary Committee's hearing record.

Sincerely,

James E. Ford

Enclosure

LIABILITY

The debates and litigation over the allocation of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or the superfund) tend to obscure certain major points. What is usually discussed are questions relating to burden of proof, demands upon superfund revenues, problems of the insurance industry, and the administrative burdens placed on government attorneys. This focus has reduced the issue to a narrow examination of whether liability should be based on negligence and apportioned or rather whether it should be strict (without regard to fault) and joint and several.

These legalistic options, while certainly important in their own right, do not take into account the issue of equity and the role of liability in the overall structure of the law. A disregard for equity, coupled with application of joint and several liability has driven activity into the courthouse and away from the fundamental goal of the law - rapid cleanup of abandoned hazardous waste sites.

Atlantic Richfield Company believes that the equity issues must not be overlooked, in part because equity is a basic tenet, but also because inequities are delaying cleanup of hazardous waste sites. Moreover, this Company is convinced that a proper balance can be struck which redresses the inequities and integrates liability into the overall scheme of the law, providing a proper balance between legal and administrative burdens while fostering actual cleanup of sites.

Very real questions of equity are raised by a law that exacts a heavy price from parties who in the past handled hazardous wastes in accordance with then-applicable rules and standards and in good faith. Questions are raised, too, by a law that forces a narrow segment of the industrial community to provide the largest share of revenues for the superfund through a tax on crude oil and chemical feedstocks.

Even if these questions of equity are discounted, other, absolutely unnecessary inequities are created by the application of the superfund law's liability standards.

If only a small percentage of wastes in a site can be traced to a few generators, those few are held accountable for the entire cleanup. The law places no burden on the government to attempt to locate all of the generators. Once a few "deep pockets" are found, the government holds those few companies accountable for all costs. Furthermore, even if those companies do pay for remedial actions in their entirety, the government will give them no release from future liability, which may extend to potential problems at secondary sites where wastes from the original site are placed.

This approach by the government naturally tends to make identified parties reluctant to enter into settlement agreements. What's more, parties who are joined by the government in superfund litigation typically file their own actions against other potentially responsible parties whom the government has not sought out to compel the latter parties' contribution to cleanup costs. In sum, the application of strict, joint and several liability produces the expenditure of millions of dollars in attorneys fees but no actual cleanup of the site at issue.

This serious situation would be worsened by certain provisions included in the superfund reauthorization (S. 51) reported by the Senate Environment Committee. Atlantic Richfield Company recommends repeal of these provisions

(Sec. 126, contribution and parties to litigation, and section 133, pre-enforcement review).

Taken together, these sections would place potentially responsible parties who become the subject of joint and several liability actions by the government at an extreme disadvantage.

First, the section 126 bar on bringing claims for contribution or indemnification in advance of a final judgment or settlement would create additional obstacles to settlements. Current law allows for joinder of other potentially responsible parties in the context of a superfund action by the government; increasing the involvement of all PRPS increases the likelihood that a settlement will be reached. In addition, section 126 would require a responsible party, in effect, to go to court twice, thus doubling the costs and time involved in litigation.

Current law in this regard should be retained; if any change is needed, language could be added to explicitly state that right of contribution does exist under CERCLA, except that parties who do enter into settlements will not be liable for claims for contribution by non-settling parties.

Second, the section 133 limitations on pre-enforcement review would place potentially responsible parties at the mercy of the government. Parties could be forced to engage in and pay for remedial actions which go far beyond that necessary to provide protection for human health and the environment. If a party cannot challenge the cost-effectiveness and appropriateness of an EPA-ordered remedial action, then that party would have no recourse to filing claims against the superfund if that remedial action later proved to be cost-ineffective or inappropriate.

The right to challenge such decisions prior to enforcement must be retained.

Atlantic Richfield understands that the Senate Judiciary Committee may find that the issue of joint, strict and several liability does not lie within the committee's jurisdiction. Nevertheless, this Company does believe that the liability problems outlined above should be addressed in the following manner:

o Parties who have not acted negligently or illegally should be allowed to settle for an apportioned share of the cleanup.

o Non-settling parties, negligent parties and those who violated applicable laws could continue to be held strictly, jointly and severally liable. This would create strong incentive for settlement and would curtail litigation delays.

o The superfund should be used to pay for those portions of cleanups that cannot be assigned to responsible parties. This would not only be equitable, and consistent with the purpose of the superfund, it would give the government incentive to find more responsible parties.

o Once a party has settled, that must terminate their liability.

CITIZENS SUITS

S. 51 would give private citizens authority to bring suits against the government and/or against potentially responsible parties under CERCLA. Atlantic Richfield Company believes such a provision is ill-advised.

Over the last five years under CERCLA, we have learned that the issues raised by this law **are extraordinarily complicated.** They present unprecedented administrative challenges to the government. They present extraordinary demands on Superfund, on government, and on industry financial and personnel resources. Some sense of priorities and a planned and orderly approach to the problem of waste site cleanups must guide the law's implementation.

No matter how the government approaches its job, no matter how it sets its priorities, someone will feel aggrieved. The citizen-suit provision in S. 51 would give virtually unlimited authority to sue and to disrupt the government's implementation of the law. The provisions are an invitation to chaos that will delay - not facilitate - the cleanup process. Money spent in litigation is money not spent in cleanup.

Atlantic Richfield recommends repeal of the citizen-suit provision of S. 51. However, if repeal is not possible, at a minimum, Sec. 118 of CERCLA (as would be added by Sec. 138 of S. 51) should be amended so that only parties who have an actual stake in an action can sue. It should also be amended so that the citizen-suit provision does not become a revenue-raising tool for citizen-suit plaintiffs.

Atlantic Richfield recommends the following:

- Standing to sue should be limited to those parties who can show an injury directly caused by a violation of the law or a failure by the government to act, with the exceptions already provided in S. 51.

- Subsection 118(e) should be amended by the addition of the following at the end of the first sentence of the subsection:

  "except that no attorney or expert shall be compensated at a rate in excess of the highest rate of compensation for attorneys and experts with comparable experience and expertise paid by the United States Environmental Protection Agency or Department of Justice."

Atlantic Richfield Company
June 6, 1985

STATEMENT
FOR THE RECORD
BY
U.S. DEPARTMENT OF ENERGY
BEFORE THE
COMMITTEE ON THE JUDICIARY
U.S. SENATE
JUNE 7, 1985

Mr. Chairman, the Department of Energy is pleased to provide comments on several provisions of S.51, "the Superfund Improvement Act of 1985."

The Department of Energy (DOE) strongly supports the Administration's legislative proposal for the reauthorization of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). DOE is committed to protecting the health and safety of employees at DOE facilities and providing protection to the environment. In addition to CERCLA, the Department is working to meet the requirements of other applicable Federal laws, such as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Atomic Energy Act, and many state environmental laws. DOE's Office of Defense Programs, for example, is expending $360 million in Fiscal Year 1985 to meet environmental requirements of these and other related laws at its nuclear weapons facilities. In addition, DOE's Office of Nuclear Energy is expending $160 million in Fiscal Year 1985 on remedial action program activities at radioactively contaminated sites to meet the requirements of the Uranium Mill Tailings Radiation Control Act and other public laws.

With respect to CERCLA sites, there is some uncertainty regarding the ultimate number of these sites on DOE facilities and the scope and magnitude of any resulting clean-up program. The Department is actively identifying our inventory, which should be completed by the end of this year. As a practical matter, we do not believe that it will be possible to clean up all of the CERCLA sites simultaneously. All sites do not pose identical degrees of risk to public health, safety or the environment. Uncertainties related to clean-up standards as well as inevitable funding and resource limitations must also be taken into account. Consequently, it is necessary for such work to be prioritized based upon an analysis of relative risks and available funding. The DOE is currently in the process at its eight operations offices of conducting site assessments and characterizations in the first phase of a five phase CERCLA program. This prioritization will ultimately be accomplished through scientific and administrative judgments as reflected in the authorization and appropriations processes.

We are concerned, however, that the cumulative impact of various CERCLA amendments under consideration by both the House and Senate could have the unintended effect of hampering or preventing a national program that provides prioritized and cost-efficient clean-up of sites on these facilities, as well as impeding our ability to meet the requirements of many other environmental laws. The potential costs associated with CERCLA compliance activities are not fully known at this time because a number of variables such as the total number of locations, time frames, and clean-up standards have yet to be ascertained. We believe it is not unrealistic to think in terms of multiple billions of dollars. Considering such huge outlays for DOE and the estimates of other Federal agencies, we would agree with the Office of Technology Assessment that careful consideration must be given by Congress to this reauthorization.

The Department of Energy supports citizen involvement in DOE environmental compliance activities. For example, under the National Environmental Policy Act, environmental impact statements prepared for various activities at our facilities provide for extensive public participation. In fact, DOE is currently engaged in the NEPA process for remedial action at several of our facilities. With respect to S. 51, we are opposed to section 138, which authorizes citizen suits against Federal agencies, and section 137, which establishes mandatory schedules for assessing the need for remedial action and the start of clean-up. We recommend that both be deleted. While we recognize that this Committee may not have jurisdiction to explore the substantive issues posed by section 137, we present them to you because section 137 is inextricably connected with section 138.

Section 137 of S. 51 would impose mandatory schedules for the undertaking by Federal agencies of preliminary assessments, remedial investigation, and feasibility studies; the mandatory ranking of Federal sites on the National Priorities List the entering into of clean-up compliance agreements between the responsible Federal agency and EPA; and the start of remedial action. Section 138 of S. 51 would authorize citizen suits "against any person, including the United States and any other governmental instrumentality or agency... who is alleged to be in violation of any standard, regulation, condition, requirement or order which has become effective pursuant to this Act."

DOE believes that clean-ups should be accomplished expeditiously and is continuing its activities with this as a primary goal. However, the various schedules imposed by S. 51 are not reasonable and simply do not reflect the realities of agency funding and other Congressionally imposed requirements. For example, the operation of the normal two-year budget cycle, required interagency and public review, additional delays in obtaining appropriated funds from Congress, the time needed to select qualified clean-up and construction contractors through competitive procurement in accordance with Federal acquisition and procurement regulations, and the one-year or longer time normally needed to collect and analyze representative water, soil and air samples, all are subject to delays beyond the control of the responsible agency and can directly cause an agency to miss the deadline and, therefore, subject the agency to a citizen suit. Moreover, the remedial investigation sometimes identifies additional releases of hazardous substances at a site, which in turn require additional laboratory analysis and engineering work before remedial action can even begin, which again could take well over a year. This could also cause an agency to miss its deadline.

The cumulative effect of the statutorily imposed schedules and the extremely broad citizen suit provision contained in S. 51 could lead to ad-hoc court-imposed prioritization for the clean-up of individual Federal facilities. These requirements are likely to interfere with the DOE's ability to comprehensively plan, prioritize, and implement environmental compliance projects under CERCLA and other environmental laws on the basis of environmental, health, and safety risk assessments. As a result, overall environmental compliance could suffer.

DOE believes that the most appropriate way to identify and clean-up individual sites is through a dedicated program to achieve these objectives. Funding and schedules to implement this program would best be accomplished through the normal operation of the budget process. Citizen suits authorized under section 138 could create significant problems in that individual courts would review Federal agency actions at individual sites, and could issue orders with respect to those sites without necessarily considering the need for Federal agencies to move on a more expedited basis to undertake clean-up activities of a higher priority at other sites. Those other sites would not be under consideration by that particular court. If the bill were enacted, DOE consequently may be forced to delay or defer work on CERCLA sites or on other sites where high priority work is in progress to meet requirements of Clean Air and Clean Water Acts, even though the public health and safety concerns in these other areas may be greater.

The defense of factually and technically complicated citizens suits by DOE and other Federal agencies will divert limited legal and program staff resources from supporting clean-up efforts to the litigation process including the management of protracted discovery involving the location, analysis, and production of voluminous amounts of historical records, and the taking of depositions, filing of affidavits and preparation of pre-trial motions. So too it may be a necessary legal action to delay or suspend clean up activities at all sites until a particular matter at one site which is under judicial review is resolved. Consequently, litigation itself could well be expected to increase the uncertainty attendant to DOE's environmental compliance activities.

We would also like to add that section 137 has other problems in addition to those described above. For example, the section requires agencies to submit annual budget requests for funding adequate to complete remedial action, and it purports to restrict the power of the President to redelegate certain Executive Branch authorities to agencies other than EPA. These provisions, by themselves, impermissibly interfere with Presidential authority. Moreover, these provisions, particularly when combined with the citizen suit provision in section 138, may well result in Courts impermissibly interfering with the President's authority.

This concludes our formal statement. We appreciate the opportunity to present the Department's views on these important matters.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

June 5, 1985

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

RE: S. 51 — the "Superfund Improvement Act of 1985"

I wish to express my appreciation for the opportunity you have afforded the Judiciary to comment on S. 51 — the Superfund Improvement Act of 1985.

In the first instance, I want to commend you, Senator Thurmond, and the ranking Minority Member, Senator Biden, for your continued interest in reviewing all legislation imposing new major responsibilities on the Federal courts, particularly where such responsibilities involve complex remedial regulatory programs.

Mr. Chairman, the legislation before the Committee does impose a significantly expanded role for the Federal judiciary in the continued implementation of the superfund hazardous waste program. Section 103 of the original superfund Act (42 U.S.C. § 9601 et seq.) is amended to create a new administratively imposed civil penalty for failure to make timely hazardous substance release reports and provides for judicial review of penalties and also separate enforcement actions with respect to orders imposing such penalties. Section 104(e) is amended to expand the President's authority to acquire information concerning hazardous substances by request or inspection and expressly provides an enforcement authority through the courts. Amendments to section 106 establish an express right of reimbursement for certain persons who incur costs in responding to orders to assist in abating a hazardous substance situation presenting an imminent and substantial danger to the public health or welfare or the environment and a judicial remedy to review denial of reimbursement by the government. Amendments to section 107 create a new lien procedure in favor of the United States for costs incurred by the government with respect to response actions under the Act and an in rem judicial enforcement action. Section 113 is amended to permit judicial review of superfund regulations in any circuit, in addition to the present review in the D.C. Circuit, where the applicant resides or transacts business which is directly affected by the regulation. Finally, Mr. Chairman, the bill adds a new section 118 — modeled on similar provisions of the Clean Air Act (42 U.S.C. § 7604), the Clean Water Act (33 U.S.C. § 1365), and the Solid Waste Disposal Act (42 U.S.C. § 6972 — to provide, among other things, a right, after certain conditions are met, for any person to sue in Federal court, without regard to the amount in controversy or the citizenship of the parties, to enforce standards, regulations, conditions, requirements, and orders under the Act, and to seek performance of nondiscretionary duties of Federal officials under the Act.

The Judicial Conference rarely formulates formal positions on legislative proposals creating new rights and causes of action, routinely deferring to the judgment of Congress in such instances. The above amendments to the original superfund Act fall within this fundamental classification. Accordingly, the Judicial Conference would express no views on the merits of these proposals.

The Conference does not, however, intend thereby to suggest indifference to enactment of legislation of significant potential impact upon the workload of the Federal judiciary. It is hoped that the Congress will carefully weigh the impact a particular enforcement scheme may have on the judiciary as a part of its consideration of the efficient and effective utilization of Federal resources. The courts hear lawsuits, but do not inititate them. Your hearing process realistically provides the best method for obtaining from those most familiar with the underlying subject matter of the proposal their estimates of the scope of the problem and likely enforcement policies which are necessary to any assessment of the potential litigation burdens.

One aspect of the pending bill has been considered by the Judicial Conference. The bill amends section 113(a) of the original superfund Act to establish a random selection procedure to resolve "race to the court house" issues involving court of appeals review of superfund regulations. The Conference has endorsed a scheme of random selection of a court of appeals to review simultaneously filed petitions to review agency orders, but with the proviso that the selection of a court of appeals to hear the appeal be vested in the Judicial Panel on Multidistrict Litigation. The pending bill is objectionable to the Conference because it vests the selection in the Administrative Office of the United States Courts rather than the Judicial Panel on Multidistrict Litigation. The Administrative Office does not have, nor should it be vested with judicial powers. Enclosed for your information is a copy of the Judicial Conference recommendation on this issue.

I also point out for your consideration that a bill to deal generally with the problem of multiple filings for judicial review of agency action (H.R. 439) passed the House on May 13, 1985, in a form supported by the Judicial Conference. This non-controversial legislation is currently pending in the Senate Judiciary Committee. The Conference prefers solving the general "race to the court house" problem with general legislation, such as H.R. 439, rather than the proliferation of separate provisions for each regulatory scheme.

I hope that these observations will be useful to you in considering amendments to the current superfund Act.

Sincerely,

William James Weller
Legislative Affairs Officer

Enclosure

REPORT
of the
PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 21-22, 1983

Washington, D.C.
1983

RACE TO THE COURTHOUSE

The Administrative Conference of the United States had recommended that 28 U.S.C. 2112(a) be amended to provide that if petitions to review the same order of an administrative agency have been filed in two or more courts of appeals within ten days after the order was issued, the agency is to notify an appropriate official body, such as the Administrative Office of the United States Courts, of that fact; that the official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which the petitions have been filed, according to a scheme of random selection, and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen. That particular court of appeals would take jurisdiction and conduct review proceedings, subject to its existing power to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.

The American Bar Association has endorsed the concept of random selection, but has suggested that the selection be made on the basis of appeals filed through the fifth business day after the day an agency action becomes reviewable. This proposal was embodied in legislative proposals previously considered by the Conference (Conf. Rept., Mar. 1980, p. 11; Conf. Rept., Sept. 1982, p. 69).

The Committee pointed out that the Administrative Office does not have, nor should it be vested with judicial powers. On the other hand, the Judicial Panel on Multidistrict Litigation has exercised a similar power for many years with respect to the consolidation of cases for pretrial discovery. The Committee therefore recommended that the Judicial Conference continue to endorse a scheme of random selection of a court of appeals to review simultaneously filed petitions to review agency orders, but with the additional proviso that the selection of a court of appeals to hear the appeal be vested in the Judicial Panel on Multidistrict Litigation. This recommendation was approved by the Conference.

LIMITATION ON THE JURISDICTION OF FEDERAL COURTS OVER STATE CASES

H.R. 46, 98th Congress, would add a new Section 1621 to Title 28, United States Code, providing as follows: "No court of the United States that is established by Act of Congress

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036 202—797-6800

June 6, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
United States Senate
Washington, D.C. 20510

The Honorable Joseph R. Biden, Jr.
Ranking Minority Member
Committee on the Judiciary
308 Hart Senate Office Bldg.
United States Senate
Washington, D.C. 20510

Re: S. 51 (Reauthorization of the Hazardous Waste Superfund Law)

Dear Senators Thurmond and Biden:

This is to convey the views of the National Wildlife Federation, on behalf of its 4.5 million members and supporters and its 52 state and territorial affiliates, on the issues which have been referred to the Judiciary Committee (until June 14th) on aspects of S. 51, a bill to reauthorize the Superfund Law, as reported out of the Committee on Environment and Public Works and the Committee on Finance. Specifically, the comments below address each of the following issues: (1) contribution and parties to litigation (§ 126); (2) judicial review (§ 132); (3) pre-enforcement review (§ 133); (4) citizens suits (§ 138); and (5) strict, joint, and several liability.

As a general proposition, the National Wildlife Federation supports a strong and effective Superfund law--one which provides sufficient funding and legal authority to permit and require the clean-up and remediation of the country's highest priority uncontrolled hazardous substance repositories within the next decade. The Act's judicial review and enforcement provisions should serve the function of creating a strong and effective deterrent to private party recalcitrance and should operate in a way which encourages responsible parties to come forward and assume their fair share of the clean-up burden (rather than "hiding in the weeds" in the expectation that the government will concentrate its enforcement efforts on other, larger and more visible, parties).

The Federation generally supports and endorses the prepared statement of Janet Hathaway of Congress Watch, to be presented at the Committee's June 7th hearing.

1. Contribution and Parties to Litigation (§126)

S. 51 would clarify and confirm existing law governing liability of potentially responsible parties (PRPs) by specifying (in § 126) that: parties found liable under § 106 (abatement action) or § 107 (liability) have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid; and that parties who reach a judicially approved good faith settlement with the government are not liable for the contribution claims of other liable parties. The bill goes further, providing that, where a civil or administrative action is underway, any related contribution or indemnification actions by defendants or third-party defendants may be brought only after a judgment has been entered or a settlement in good faith has been reached in the initial civil or administrative action.

The first two of these provisions are clearly desirable (and do little more than codify existing court precedent and administrative practice). They will encourage private party settlements by assuring the ability of settling parties to seek contribution from other PRPs and by insulating settling parties from liability for additional response costs in later contribution actions by other PRPs.

The third provision (designed to postpone counterclaims, cross-claims, and third-party actions until a judgment or settlement is reached in the main action) seems a bit more questionable. The Administration, which proposed and supports this amendment, justifies it on the grounds that it would enable the government to more effectively and expeditiously manage Superfund litigation in cases which may involve dozens or even hundreds of PRPs with differing types and degrees of involvement in the facility. If parties sued by the government were free, as part of the main action, to sue other PRPs, the result could be (in the Administration's view) "massive and potentially unmanageable litigation."

We certainly sympathize with the government's desire to manage and expedite Superfund litigation. Anything which diverts the government's already thinly-spread Superfund litigation resources is clearly undesirable. On the other hand, the government's burden should not be transferred to the Federal judiciary, and PRPs should not be unduly inhibited in their efforts to limit their clean-up obligations by forcing other PRPs to bear their fair share of responsibility.

We are not persuaded that the government's interests in simplifying Superfund litigation could not be equally (or nearly equally) well-served by leaving unmodified existing joinder and intervention rules, but requiring that a bifurcated trial occur. Under this approach, the first phase of the litigation would be restricted to determining (1) whether the PRPs collectively bear liability for the clean-up of a particular Superfund site; and (2) if so, what is the extent of that (collective) liability, in terms of appropriate response actions and associated clean-up costs. Only in the second phase would the allocation or apportionment of liability among the individual PRPs be addressed. The government would be free to not actively participate in this second phase--unless, of course, a Federal owner or operator was itself a PRP, or if there is a clearly "orphan" portion of the site for which no solvent or identifiable PRPs can be found, where there is a possibility that the Fund might be called upon to bear some share of the ultimate clean-up costs.

It should be noted, finally, that the "right of contribution" question may, in many cases, be overrated in its real-world significance. We have been told by several major chemical companies, for example, that they are generally reluctant to pursue contribution actions, because the PRPs against which they might proceed are often their own customers or suppliers whom they would not be anxious to alienate. Of course, there doubtless are other manufacturing firms, including smaller chemical companies, with less-encompassing business relationships, for whom the presence or absence of the right to pursue contribution actions would be a more significant consideration.

2. Judicial Review (§ 132)

Section 132 of S. 51 would allow appellate review of a Superfund regulation in any U.S. Court of Appeals for a circuit in which the applicant resides or transacts business which is directly affected by such regulation. Current law, § 113(a) of CERCLA, restricts such review to the District of Columbia Circuit.

Each of these approaches has its pros and cons. Restricting review to the D.C. Circuit has the advantage of allowing a single court to develop expertise in a complex area of the law and of eliminating conflicting interpretations of the law in different circuits. It has the disadvantage of being inconvenient to litigants who do not reside in Washington, D.C., and also deprives the law of diverse views on complex legal issues (potentially making more difficult the task of the Supreme Court as the final arbiter of what the law is).

Similarly, the proposed alternative of allowing review in other convenient circuits, while avoiding the inconvenience and judicial inbreeding problems, gives rise to the "race to the courthouse" phenomenon whereby various litigants rush to file their petitions first with the court they view to be most receptive to their positions. Although S. 51 proposes to make this process "more orderly" by adopting a "random selection procedure" (coupled with the inherent power of the reviewing court to transfer venue to any other court of appeals for the convenience of the parties or otherwise in the interest of justice), there is something unseemly about making important decisions via a lottery process (one also wonders why it should be necessary to go through a "lottery" if the designated court of appeals can simply turn around and transfer venue on "*forum non-conveniens*" grounds to another court of appeals).

It occurs to us that the best approach may lie in-between the current approach of § 113(a) and the proposed approach of § 132 of S. 51. Specifically, why not establish a presumption of review in the D.C. Circuit, but authorize that court to transfer venue to another appellate court, upon the request of a party, if the convenience of the parties (and, in particular, of the petitioner) so warrants?

3. *Pre-Enforcement Review § 133)*

S. 51 would clarify the process for judicial review of government decisions on the appropriate extent of response and the liability of PRPs under §§ 113 (litigation, jurisdiction, venue) and 106 (abatement action), by explicitly providing that: judicial review of all Presidential decisions concerning response is on the administrative record (rather than *de novo*); there is no pre-enforcement review of § 106 administrative orders or § 104 (response authorities) response actions or orders; and administrative orders may be subject to judicial review once response action is completed.

Reliance on the administrative record for purposes of judicial review of Superfund response actions is consistent with the approach of most federal courts toward the review of other administrative decisions. This helps assure that the basis for a response action is clearly articulated and open to scrutiny by the public, PRPs, and the courts. It also expedites the process of review, avoids the need for time-consuming discovery, and assures that the reviewing court's attention is focused on the criteria and supporting data used in selecting the response. Existing administrative law principles will continue to allow parties to introduce supplementary materials explaining or clarifying the record, if major deficiencies are shown to exist in the administrative record that has been assembled--thereby ensuring that parties can obtain a full and fair review of EPA response actions.

The proposed preclusion of pre-enforcement judicial review of administrative orders or response actions is designed to avoid significant delays and obstacles in providing needed clean-ups. It would also increase the attractiveness to PRPs of voluntary clean-ups and negotiated settlements (by eliminating the opportunity to gamble that a court will block the proposed clean-up). This does little more than confirm and clarify existing law. As was established by the Supreme Court in 1967 in the *Abbott Labs* "trilogy" of cases (*Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158; and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 158) judicial review is disfavored "until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." Courts will evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Pre-enforcement judicial review is ordinarily allowed only where administrative action creates a dilemma for a private party who must choose between disadvantageous compliance and risking serious penalties for non-compliance.

In the Superfund context, the provision of S. 51 (§ 133) authorizing reimbursement from the Fund for costs incurred in responding to an administrative order, and providing opportunities for judicial review of administrative orders once the response action required by the order is completed, removes any dilemma which might justify pre-enforcement review under the Abbott Labs line of cases.

Accordingly, we support retention of § 133 as proposed by the Administration and as reported by the Senate Environment Committee.

4. Citizen Suits (§ 138)

S. 51 would add a new § 118 to the Superfund law, providing (in § 138 of the bill) a right for citizens to sue in Federal court to enforce standards, regulations, conditions, requirements and orders under the Act and to seek the performance of nondiscretionary duties under the Act by the President or his delegees. Citizens would also be granted a limited right to intervene in governmental enforcement actions brought in Federal courts, with the converse right of the President or a delegee to intervene as a matter of right in any citizen action brought under the citizen suit provision.

The proposed citizen suit provision is modeled after the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act (RCRA). Such provisions have been a standard feature of each of the major environmental laws since the early 1970's. The only noteworthy departures from earlier statutory precedents are: (1) it would require 90 days', rather than 60 days', advance notice of intent to sue (to provide sufficient time for the Administrator to conduct a satisfactory investigation acceptable to affected parties); (2) it would eliminate court jurisdiction to review challenges to § 104 or § 106 administrative orders or to emergency response actions under § 104 (to preclude pre-enforcement citizen suits, in parallel with limitations under proposed § 133 on pre-enforcement industry suits--except that, as worded, the citizen suit preclusion would be total and not limited to the pre-enforcement stage); (3) it would allow citizens to intervene as a matter of right in Superfund actions brought by the President or a State, unless the latter demonstrate that the applicant's interest is adequately represented by existing parties (this would reverse the traditional burden on intervenors, under the Federal Rules of Civil Procedure, to affirmatively demonstrate that the applicant's interest is not adequately represented by the existing litigation parties); and (4) the savings provision of the proposed citizens suit section, designed to preserve other statutory and common law remedies, states that"Nothing in this Act shall restrict or expand any right..." (whereas the other citizen suit provisions specify merely that they are not intended to restrict otherwise available litigation rights).

The National Wildlife Federation strongly supports the inclusion of a citizens suit provision in the Superfund law. It provides an opportunity for private citizens, citizens' groups, and state and local governments to bolster Federal enforcement efforts under Superfund. In doing so, it promotes the fairer and more equitable administration of the law by reducing the likelihood that recalcitrant parties will successfully evade responsibility because of limited governmental enforcement resources. In turn, the more parties are forced to participate and assume their fair share of responsibility, the more voluntary private clean-ups and negotiated settlements are likely to occur (because volunteers and settlers will no longer be forced to bear not only their fair share of liability, but also part of the liability of recalcitrant parties).

The provision includes many safeguards and qualifiers to ensure that citizen suits will complement, and not interfere with, Federal regulatory and enforcement programs. It also enables individuals who may be assuming an imminent and substantial risk as a result of a PRP-defendant's past practices (or contemplated "clean-up" plan) to intervene in government- or industry-initiated suits, "particularly in fashioning the appropriate remedy for eliminating the risk."

Various problems have been raised with including a citizens suit provision in Superfund. They range from the concern that it will open a floodgate of litigation and an overburdening of the Federal courts, to the concern that it will unduly divert EPA from cleaning up Superfund sites to defending itself in court. These arguments are unpersuasive and represent gross exaggerations. Despite the existence of citizen suit provisions in Federal environmental statutes for the past decade-and-a-half, they have tended to be used very selectively and have amounted to more of a "dribble" than a "torrent" (see Environmental Law Institute study). And, since citizen suits against EPA (for failing to perform non-discretionary duties) tend to be straightforward cases that require resolving only two questions--was there a nondiscretionary duty and, if so, did the agency fail to perform it?--the diversion of agency resources, if any, can be seen to be miniscule. It is not a matter of engaging in extensive discovery, or lining up technical experts, to address complex scientific or policy questions. Nearly always, such cases are amenable to expeditious "summary judgment."

Another concern that has been raised is that, to the extent § 137 (Federal facilities compliance) imposes mandatory obligations on the Department of Defense and other Federal agencies, the citizen suit provision may authorize private parties to sue these agencies and force them to take actions which, in some cases, might run counter to the national security interests of the United States. There are several responses to this concern. First, the only mandatory duties imposed on other Federal agencies under § 137 relate to: the timetable for commencing a remedial investigation and feasibility study for facilities placed on the National Priorities List; the requirement that interagency agreements provide for commencement of "substantial continuous physical onsite remedial action...within 12 months"; the required contents of interagency agreements; the required completion of remedial actions subject to interagency agreements "as expeditiously as practicable"; the required inclusion of requests for adequate funding to complete remedial action in each agency's annual budget submissions to Congress; the required transmittal of annual progress reports to Congress; and the prohibition against delegating powers vested in the EPA Administrator (under § 137) to other agencies. It strikes us as perfectly appropriate, and in no way unduly onerous, to require Federal facilities to meet these obligations--especially since no nondiscretionary duties are prescribed with respect to the conduct or completion of the actual clean-up work (the one activity that would be costly and time-consuming to be forced to expedite).

Second, although vitually all of the other Federal environmental statutes include national security exemptions from the general obligation of Federal facilities to meet (see e.g., § 6001 of RCRA; § 313(a) of CWA) pollution control requirements, this exemption has almost never had to be invoked.

And finally, to the extent there is felt to be a need for a national security exemption, it would seem much more appropriate to add such an exemption to § 107(g) of Superfund than to either withhold citizen suit authority or preclude its application to legal violations by Federal facilities.

A concern advanced by certain industry interests relates to the proposal to allow citizens to intervene as a matter of right in ongoing Superfund litigation. According to this line of argument, allowing citizens to intervene as parties will serve to block or delay badly needed hazardous waste site clean-ups, because:

citizen intervenors will be primarily concerned about compensation for personal economic damages (and may be effectively forced by the doctrine of "pendent claims" to assert any personal damage claims in the context of an ongoing clean-up action), whereas the government's enforcement goals must necessarily be the prompt abatement of site hazards; citizen intervenors will often disagree with the government on the type of clean-up remedy to be employed; intervention may involve long delays for additional discovery and for additional cross-examination of both original party and intervenor witnesses; and intervenors can block a settlement by simply refusing to sign the agreement. We believe these fears are overstated. Courts can exercise their traditional powers to ensure that intervenors don't unduly delay or complicate the main litigation. And, we certainly wouldn't object to clarifying legislative history to state the obvious: namely, that personal damage claims may not be raised by intervenors in a pending governmental clean-up action.

We have a few concluding recommendations for improving the citizen suits provision approved by the Environment Committee. Specifically, the citizens suit provision contained in S. 51 (as approved by the Environment Committee) should be clarified and improved by making the following changes:

(1) the limits of pre-enforcement judicial review in a citizen suit, of administrative orders or responses under §§ 104 and 106 should be made more comparable to the proposed limits under § 133 of S. 51; and

(2) the savings provision of the citizens suit section should be revised to conform to that of counterpart provisions in other environmental laws, by eliminating the words "or expand" (obviously, the addition of citizen suit authority expands pre-existing statutory and common law rights of action; the savings provision should be confined to preserving rights under other statutes and under the common law).

5. Strict, Joint, and Several Liability

S. 51, as reported by the Environment Committee, would leave unaltered the standard of liability for those who cause or contribute to hazardous substance releases from Superfund sites. Section 101(32) of CERCLA, which is not modified by S. 51, specifies that "liability" under Superfund "shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act"; the courts have virtually uniformly applied a strict, joint, and several liability standard for oil and hazardous substance spills under § 311. Cases decided under Superfund have, likewise, almost unanimously applied the strict, joint, and several liability standard where the damage resulting from the joint action (or omissions) of multiple PRPs is indivisible. See, e.g., U.S. v. Chem-Dyne Corp., __F. Supp. ___, 13 ELR 20986 (S.D. Ohio Oct. 11, 1983); U.S. v. Conservation Chemical Co., __ F. Supp. ___ (, 14 ELR 20207 (W.D. Mo. Feb. 3, 1984); U.S. v. Northeastern Pharmaceuticals and Chemical Co., ___ F. Supp. ___, 14 ELR 20212 (W.D.Mo. Jan. 31, 1984); and U.S. v. Wade, ___ F. Supp. ___, 14 ELR 20096 (E.D.Pa. Dec. 22, 1983).

The National Wildlife Federation is convinced that retention of at least an implicit strict, joint, and several liability standard is essential for the proper and effective implementation of Superfund's mandates. First, a joint and several liability scheme allows the Fund to be replenished by charging those responsible. Experience with the revolving fund under § 311 of the Clean Water Act demonstrated (as of early 1980) that cases that are not litigated return, on average, only half the money of cases that are successfully litigated. Since Superfund sites tend to involve many more potentially responsible parties than an oil spill under § 311, eliminating "joint and several" would have a far more drastic negative impact on the ability to exact clean-up costs from responsible parties and thereby replenish the Fund.

Second, without a joint and several liability mechanism, the government would have to prove which polluter contributed what pollutant to a release. In addition, the government would also have to quantify the contribution of each party. This would place an incredible burden on the government's already sparse enforcement resources, especially when the evidence needed to establish liability is usually in the nearly exclusive control of the responsible parties. The demise of "joint and several," far from removing an obstacle to voluntary clean-ups, would yield a further reduction in the government's enforcement capability, and would increase rather than decrease a party's incentive to "hide in the weeds" and disavow any clean-up responsibility.

Third, joint and several liability effectively matches the burden to the benefit of doing business in an inherently hazardous activity. In no other way can we ensure that the costs of proper disposal are internalized throughout the production chain. As between the general taxpayer (or the government) and the waste generator, it is far more reasonable to place the costs of hazardous substance releases on the generator, by incorporating that cost in the price of manufactured products, than to place those costs on society as a whole (or on the people who must live near leaking disposal sites). Finally, the joint and several liability standard creates a further incentive for industry to exercise due care in the handling of hazardous materials and in cleaning up past problems before an environmental release occurs.

Opponents of the joint and several liability approach make several arguments, the most frequent of which are the following:

1) taken literally and to its extreme limits, "joint and several" means that a contributor of one hazardous waste drum to a dump containing 10,000 drums can be held responsible for the clean-up of all 10,000 drums--an obviously inequitable result. (Our response: while it is easy to invent absurd hypotheticals, the government has never made it a practice to concentrate its enforcement energies on de minimus contributors; indeed, the government is usually criticized for concentrating too much on a few major, deep-pocket, contributors, while giving insufficient attention to a larger number of smaller PRPs).

2) "joint and several," at least when accompanied by selective enforcement, encourages litigation and discourages negotiated settlements and voluntary clean-ups by ensuring (in the first instance, at least) that a few PRPs will be forced to pay more than their fair share of clean-up costs (although these PRPs are theoretically free to seek contribution from non-participating PRPs, ongoing business relationships may make this impracticable). (Our response: this is less a fault of the "joint and several" mechanism than it is an indictment of the government's selective and ineffective enforcement program; the answer is more aggressive prosecution of recalcitrants, big or small, to ensure that more PRPs contribute to the costs of clean-up. Doing away with "joint and several" will only make the problem worse by providing even less incentive than exists now for small PRPs to come forward and accept their fair share of liability).

3) making joint and several liability an explicit statutory requirement would be even worse than implicitly retaining this requirement as it exists now, because it would force EPA to exact 100% of clean-up costs in every instance from responsible parties and would eliminate the government's discretion to promote settlements and voluntary clean-ups by accepting a lesser share of the costs. (Our response: this is a matter of wording and intent. If "joint and several" is expressly incorporated in the statute, we agree that it should be incorporated in a way which does not diminish the government's flexibility to use it as a bargaining tool).

A number of major chemical companies have come to realize that joint and several liability can be a strong weapon in the government's enforcement arsenal, and that the effective promotion of voluntary private clean-ups of Superfund sites depends on a firm and predictable enforcement effort, without altering principles of liability. Appended, as "ATTACHMENT 1," are selected excerpts from Clean Sites and Private Action: A Plan to Accelerate Private Hazardous Waste Cleanup (May 1984), demonstrating the endorsement of this view by Monsanto, duPont, Exxon Chemical, and the Chemical Manufacturers Association--all of which participated in the design and development of Clean Sites, Inc. (a non-profit corporation, launched on May 31, 1984, designed to promote the accelerated, voluntary clean-up of Superfund sites). Top officials of these corporations, as members of The Steering Committee on Hazardous Waste Cleanup, co-authored the Clean Sites and Private Action report.

During the 96th Congress, in the deliberations which led to the initial enactment of Superfund, NWF supported the "joint and several" language in § 4 of S. 1480 (as introduced on July 11, 1979 by Senator Culver, et al.). This provision imposed joint, several, and strict liability on owners, operators, "and any other person[s] who caused or contributed... to [a] discharge, release, or disposal, including but not limited to prior owners, lessees, and generators, transporters, or disposers of ... hazardous substances ...." It went on (§ 4(f)) to specify that "any generator or transporter ... who knew or had reason to know that a discharge, release, or disposal ... could reasonably be anticipated to result from the transfer of [a hazardous] substance to the owner or operator of the facility which was the source of a discharge, release, or disposal subject to liability under this section shall be deemed to be a person who caused or contributed to such discharge, release, or disposal." A later "Staff Working Paper" (Feb. 1, 1980 version of S. 1480) proposed several exceptions to the strict application of joint and several liability. One of these, which we are willing to support, provided as follows (§ 4(f)(3)): "In any case where a person held liable under this section as a person who caused or contributed ... can demonstrate by a preponderance of the evidence that (A) the contribution of such person can be distinguished or apportioned and (B) such contribution was not a significant factor in causing or contributing to the discharge, release, or disposal or the damages resulting therefrom, the liability of such person may, in the discretion of the trier of fact, be limited to that portion of the release or damages to which such person contributed." To the extent the "one barrel in ten thousand" hypothetical is considered a significant problem, language of this sort could be used to resolve it.

We append to this letter (as "ATTACHMENT 2" a copy of a February 19, 1980, NWF letter to Mr. Karl Braithwaite (then Staff Director of the Environment Subcommittee on Environmental Pollution) which articulates our thinking on allocating responsibility for compensation among liable parties, once liability has been established.

With one exception, we feel no strong need to have the "joint and several" standard spelled out in the statute--as long as the implicit applicability of this liability standard is preserved. The single exception relates to an isolated (and seemingly aberrant) Federal court decision, U.S. v. Stringfellow, ___F. Supp. ___, 14 ELR 20385 (C.D. Cal. April 5, 1984), which held that "joint and several liability" doesn't apply to administrative clean-up orders in imminent hazard situations under § 106 of CERCLA. Committee report language, and other legislative history, would be useful to clarify the intent of Congress that the "joint and several" standard applies equally to clean-up efforts under § 106 as to cost-recovery actions under § 107.

Finally, the Committee may also wish to consider (if deemed within the scope of the referral) some affirmative amendments designed to promote fuller and fairer accountability by PRPs--as a means of stimulating settlements and clean-ups. Amendments along one or more of the following lines could be useful:

-Establish a punitive damages provision (i.e., treble damages or greater) to authorize larger cost-recoveries and penalties against recalcitrant PRPs (as a means of discouraging PRPs from gambling on laying back and not being caught).

-Specify that EPA establish a dual settlement policy, with the government having less latitude to settle Superfund cases for less than the full amount of clean-up costs once litigation has begun (to encourage early settlement). EPA might also be given the authority to use Fund money to cover identifiable "orphan" portions of Superfund sites before, but not after, the onset of litigation (or where PRPs commit quickly to paying at least the clean-up costs for the non-orphan portion(s) of the site).

The Committee also might wish to signify (in report language, for example) its intent that the government direct a more sizeable share of its enforcement resources (for a while, at least) to going after recalcitrant PRPs.

I trust these comments and recommendations will be of some use to the Committee and request that they be included in the record of the Committee's June 7th hearing.

Sincerely,

Linda Roach

for Kenneth S. Kamlet
Director and Counsel
Pollution and Toxic Substances
Division

Attachments

ATTACHMENT 1

CHEMICAL INDUSTRY STATEMENTS IN SUPPORT OF A STRONG EPA SUPERFUND ENFORCEMENT CAPABILITY

The following quotes (except where otherwise noted) are from: Clean Sites and Private Action (May 1984), produced by a Steering Committee composed, among others, by representatives of Monsanto (Lou Fernandez), E.I. duPont de Nemours & Company (Bob Forney), Exxon Chemical Company (Ed Holmer), and the Chemical Manufacturers Association (Bob Roland).

-From an initial view that a federal enforcement strategy based upon "joint and several liability" impedes voluntary Superfund site clean-ups by freezing out "private sector cooperation," the Steering Committee came to recognize that the real problem was "the absence of enforcement that uses a set of 'carrots' to reward responsible behavior and 'sticks' to punish those hiding in the weeds ...." (pp. 15-16). Use of joint and several to divide liability "among the obvious or forthcoming parties," while some parties are able to "hide out" with impunity, was viewed as "unfair" (p. 16). The solution: to "make it possible for potentially responsible parties to coalesce in support of prompt cleanup," in "the presence of an effective enforcement policy" which "would not alter principles of liability ...." (p. 16).

-All participants "have agreed on the absolute necessity of an amply funded Superfund backed up by strong and consistent federal enforcement of the nation's hazardous waste laws.... Clean Sites, Inc. cannot succeed without them." (p. v).

-"The creation of Clean Sites, Inc., would not dilute enforcement. Indeed, the success of CSI is dependent on a firm and predictable enforcement effort." (p. 5).

-"We strongly believe that the success for any private effort is contingent on the presence of an adequate Superfund and the proper use of the tools provided by the government under CERCLA." (p. 40).

-"We believe that joint and several liability can be a strong tool in the government's arsenal. The courts have upheld the validity of joint and several liability, and the threat of its invocation can be a powerful weapon. However, the Steering Committee would hope that the government would be judicious in its use of this tool in order to permit this voluntary program involving the coalescing of potential responsible parties to take its course. In circumstances where parties refuse to settle on a voluntary basis, we believe that the government should use all of the tools at its disposal...."(p. 43).

ATTACHMENT 2

National Wildlife Federation

1412 16TH ST., N.W., WASHINGTON, D.C. 20036

February 19,1980

Mr. Karl Braithwaite
Staff Director
Subcommittee on Environmental Pollution
Committee on Environment & Public Works
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Karl:

Although our preferred position is total deletion of Section 4(f)(2) from S. 1480, the National Wildlife Federation, Environmental Defense Fund, Sierra Club, Natural Resources Defense Council, Environmental Action and Congress Watch have been examining alternatives to the language which currently exists in Section 4(f)(2) as you suggested at our meeting on February 14.

We feel strongly that any problems which generators may have in being found liable for releases over which they have little control should be a factor only in allocating responsibility for compensation among liable persons rather than in establishing liability.

Enclosed is language which in our view would accomplish this.

Sincerely,

Kenneth S. Kamlet

Kenneth S. Kamlet
Assistant Director for
Pollution & Toxic
Substances

KK/jl

S. 1480

New f(2):

(2) In apportioning damages between tow or more liable persons whose contributions were found to have been significant factors in causing or contributing to the discharge, release, disposal, or to the damages therefrom pursuant to subsection (f)(3), the Court may consider factors including, but not limited to, the following:

(A) Extraordinary precautions taken by each person prior to disposal to avoid public health or environmental problems;

(B) The degree of each person's cooperation with federal, state, or local officials to prevent, minimize or mitigate any harm to the public health or the environment;

(C) The size of each person's business; and

(D) Each person's ability to demonstrate by a preponderance of the evidence that

(i) due care was exercised in the selection or instruction of a contractor or other independent party for the transportation, storage, treatment, or disposal of such substance, including ensuring the financial responsibility of said contractor or independent party, and the taking of reasonable means to assure or verify that such contractor or independent party performed its task so as to minimize the probability of release or potential damage;

(ii) any labeling, loading, and packing of the hazardous substance performed by the person was done so as to minimize the probability of release or potential damage;

(iii) the container or facility in which a hazardous substance was transported, stored, treated, or disposed was equipped and maintained so as to minimize the probability of release or potential damage;

(iv) the person provided adequate information as to the identity, quantity, composition, condition, or hazardous characteristics of a substance to the transporter, storer, treater, and disposer; and

(v) the person otherwise did not know nor have reason to know that a discharge, release, or disposal of a hazardous substance could reasonably be anticipated to result from the actions or omissions of such person.

EBASCO CONSTRUCTORS INC.
A Subsidiary of EBASCO SERVICES INCORPORATED
210 Clay Avenue, Lyndhurst, NJ 07071, (201) 460-5901

June 6, 1985

J. E. Ramondo
President and
Chief Operating Officer

Sen. Strom Thurmond
218 Russell Office Building
Washington D.C. 20510

Dear Senator Thurmond:

Ebasco Constructors Inc., is one of the top ten contractors in our country and the largest in the State of New Jersey. We are involved with the National Constructors Association in attempting to make Ebasco a viable firm in the remedial cleanup work needed at the many hazardous waste sites throughout the country.

I would like to draw your attention to the contractor liability issue in the Superfund bill which is pending before the Judiciary Committee. This issue bears directly upon our desired involvement in hazardous waste cleanup activities. This similarly effects many other national firms like ours.

Over the past four years Ebasco has been forced to make business decisions preventing us from bidding six hazardous waste cleanup jobs. This is because of this unacceptable liability exposure for the company or our inability to obtain necessary insurance to participate in these projects. We believe this problem is industry-wide and needs to be addressed in a fair and responsible manner.

Congress took the lead in dealing with the nation's serious hazardous waste situtation by passing Superfund legislation in 1980. Ebasco wants to do its part to accomplish the cleanup goals which inspired that law. We believe that the strict standard of liability included in the current Superfund law is there to deter unlawful disposal of toxic substances. It also provides a mechanism for requiring the persons who caused harm, through the disposal of those substances, to pay for the cost associated with that harm.

We do not believe, however, that this standard was meant to be applied to remedial action contractors. Further, we feel strongly that a current situation exists where that, in many instances, major engineering and construction companies are not pursuing hazardous waste work. This is again because of unacceptable liability exposure that has developed contrary to the goals of the Superfund Law.

To remedy this situation, we ask you to consider supporting changes to the Superfund Law that would treat remedial action contractors in accordance with a standard that holds them responsible only for their negligent action or inaction as determined by relevant standards at the time of the contractor's conduct. Additionally, a statutory maximum of financial responsiblity as well as a rational statute of limitations are also necessary to present a reasonable business risk so that responsible, qualified contractors will be encouraged to carry out these cleanup activities. I have enclosed material, developed by NCA, which discusses these needed changes in more detail.

We would be glad to discuss this further with you or your staff or provide more detailed information if needed. Thank you for your attention to this matter — it is most important to us.

Sincerely yours,

John E Ramondo

JER/mh
Enc.

American Paper Institute
ENVIRONMENTAL & HEALTH PROGRAM
National Forest Products Association
1619 Massachusetts Avenue, N.W. • Washington, D.C. 20036

Michael C. Farrar
Vice President
202-797-5784

June 11, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The American Paper Institute and the National Forest Products Association appreciate the opportunity to submit the enclosed statement for inclusion in the record of the Senate Committee on the Judiciary's hearings on S. 51, "Superfund Improvement Act of 1985."

We look forward to continuing to work with the Committee on these important issues.

Sincerely,

Michael C. Farrar

Enclosure

MCF/pmp

WRITTEN STATEMENT FOR THE RECORD
BY
THE AMERICAN PAPER INSTITUTE
AND
THE NATIONAL FOREST PRODUCTS ASSOCIATION

INTRODUCTION AND STATEMENT OF INTEREST

The member companies of the American Paper Institute and the National Forest Products Association ("API/NFPA") are directly affected by several provisions of S. 51, the Superfund Improvement Act of 1985, which is now before the Senate Judiciary Committee. These include § 126 (Contribution and Parties to Litigation), § 133 (Pre-Enforcement Review) and the general concept of "joint and several liability" as it has been applied under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund").

API's 170 member companies provide about 90 percent of all the pulp, paper and paperboard manufactured in the United States. In the course of their manufacturing processes, these companies use small amounts of hazardous substances subject to Superfund and generate substantial volumes of solid wastes, only a small portion of which are hazardous wastes subject to the Subtitle C requirements of RCRA.

Similarly, the 2,500 forest products companies represented by NFPA produce a large portion of the nation's solid wood products such as lumber and plywood. Timber products manufacturing also generates substantial quantities of waste materials - of which some lesser amounts are hazardous. Typically, API/NFPA member companies are "small contributors" to hazardous waste Superfund sites.

API/NFPA believe that it is in the nation's interest that CERCLA be effectively implemented. Although we support prompt cleanup of hazardous waste sites, we urge that cleanup and related government enforcement activities be fairly conducted, particularly with respect to small contributors to such sites. We have carefully studied various legislative proposals affecting the judicial system which have been offered by members of the Congress in recent months. Although we support the reauthorization of CERCLA, API/NFPA have strong concerns about certain of these proposals which affect judicial review and liability of responsible parties. These concerns are detailed below.

Pre-Enforcement Review

Section 133 of S. 51 precludes judicial review of CERCLA § 106 abatement orders and § 104 response orders unless and until the government seeks to recover response costs, enforce an abatement order, or recover a penalty for violation of an abatement order.

Delaying judicial review of § 106 abatement orders may be justifiable because such orders may be issued only in emergencies "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance...." But, response orders issued under § 104 do not necessarily occur in such emergency situations. Absent emergency conditions, it is fundamentally unfair to deprive affected parties of independent and impartial review of Agency response orders.

Moreover, at least two U.S. District courts have found that CERCLA's failure to provide pre-enforcement judicial review of EPA's response orders presents substantial constitutional

issues. One United States district court concluded that **CERCLA's** failure to provide a hearing before EPA enforces remedial action orders may constitute an unconstitutional denial of due process. *Aminoil v. EPA*, 21 ERC 1817, 1821-22 (C.D. CA. 1984). Another district court stated that "CERCLA's failure to provide either a pre-deprivation or *prompt* post-deprivation hearing may represent an unconstitutional deprivation of ... due process rights." *Industrial Park Development Co. v EPA*, 22 ERC 1593, 1597 (E.D. Pa. 1985) (emphasis added).

Putting to one side the difficult constitutional issues raised by denying prompt review of Agency cleanup orders, there remains the illogical delay of such review for *non-emergency* orders issued by EPA under § 104. That matter, at least, may be simply remedied. API/NFPA recommend that § 133(b) of S. 51 be revised to restrict pre-enforcement review of Superfund cleanup actions only in circumstances where there is "an imminent and **substantial** endangerment to the public health or welfare or the **environment.**" New § 113(f) created by S. 51 should be amended by inserting the following after "104" the second time it appears in the subsection:

> ", which the President finds is necessary to remedy a release or substantial threat of a release which presents an imminent and substantial danger to the public health, welfare or the environment..."

Contribution and Parties to Litigation

Section 126 of S. 51 establishes that liable parties have a statutory right to seek contribution from other liable parties. It also affords those who enter into a "judicially approved good faith settlement" with the government protection from contribution actions by non-settling parties who may later be subject to enforcement proceedings. API/NFPA support these aspect of § 126, because they will encourage voluntary, private party cleanup of Superfund sites and they will maximize the number of potentially responsible parties who will join voluntary cleanup efforts. In addition, an explicit statutory provision authorizing contribution is necessary because, although many courts have found such a right to exist in CERCLA actions, at least one court has held to the contrary. U.S. v. Westinghouse Electric Corp., 22 ERC 1230, 1233-34 (1983). Accordingly, API/NFPA recommend that the Senate Judiciary Committee endorse the statutory right of contribution and contribution protection found in § 126 of the Senate Environment and Public Works Committee bill.

API/NFPA do not, however, support that portion of § 126 which postpones claims "for contribution or indemnification" until after settlement or judgment is entered in the original enforcement action. The Environment Committee report explains that this provision is intended to "promote [illegible]ditious management of litigation". S. Rep. No. 99-11, 99th Cong., 1st Sess. 44 (1985). We believe the opposite result will occur and that this provision will discourage voluntary, private party cleanups which involve most if not all of the potentially responsible parties.

The Environment Committee report correctly notes that the government need not sue all potentially responsible parties in the same judicial action. Id. In such cases, those who are sued will look to other potentially responsible parties to pay their fair share. However, if those involved in the government's original enforcement action are unable to involve all potentially responsible parties in that action, then they cannot be assured of equitable treatment and will, accordingly, be reluctant to engage in settlement talks with the government.

Potentially responsible parties who are not involved in initial government lawsuits may choose to stay out of initial settlement efforts -- knowing that they cannot be forced into the initial litigation because of this "feature" of § 126 -- and hope for better treatment in whatever subsequent action the government or the original defendants might bring. The very fact that non-defendant, responsible parties will be able to delay, by virtue of § 126, the ultimate payment of their fair share of cleanup costs will be a strong motivation for those parties not to participate voluntarily in an expeditious settlement. This, of course, would defeat the policy favoring voluntary private-party cleanup, contrary to other provisions of S. 51 and contrary to both Congressional and EPA expectations.

Moreover, delaying contribution actions would not result in "expeditious management of litigation", contrary to the expectations of the Senate Environment Committee. Although the government's original lawsuit might be more readily handled from its perspective because fewer parties are involved, that tells only part of the story. After that case is concluded the original defendants will bring numerous contribution actions perhaps in a variety of jurisdictions. These multiple cases will require more "overhead" from the United States judicial system and will occasion larger transactional costs for the litigants than would have occurred had all of these claims been included in the government's original enforcement action. Permitting contribution actions to be brought in the enforcement action will bring all of the potentially responsible parties before one court at the same time and will make possible the simultaneous resolution of all claims relating to a site. The judicial economy of this system is exactly why the Federal Rules of Civil Procedure allow third-party actions to be brought. There is every reason to apply the same principle in Superfund cases, since it has served so well in other areas of civil litigation.

For all of these reasons, API/NFPA urge the Senate Judiciary Committee to remove from § 126 the impediment against including all claims for contribution or indemnification in the original government enforcement or claim proceeding.

Joint and Several Liability and Apportionment

S. 51 is silent on the question of joint and several liability. This, in the view of the Senate Environment and

Public Works Committee, means that the matter "will be resolved pursuant to Federal common law ... on a case-by-case basis, taking into account relevant equitable considerations." S. Rep. No. 99-11, 99th Cong., 1st Sess. 45 (1985). It now appears to be fairly well settled that the federal courts will undertake a case-by-case analysis of the facts at each particular Superfund site and impose joint and several liability as a matter of Federal common law if the facts so warrant. *U.S. v. A&F Materials Co.*, 20 ERC 1353, 1360 (S. D. Ill. 1984), *U.S. v. Chem-Dyne*, 19 ERC 1953, 1956 (S.D. Ohio 1983). However, these courts were well aware of the potential unfairness of this doctrine, particularly when applied to small contributors to Superfund sites. Accordingly, the courts have rejected any interpretation of CERCLA which would require automatic application of the doctrine of joint and several liability and have mitigated the potentially harsh consequences of applying that doctrine by making distinctions among waste contributors based on a variety of factors such as the amount of waste contributed to a particular site.

In *Chem-Dyne*, Chief Judge Rubin observed that deletion of the term "joint and several liability" from the original House and Senate versions of CERCLA was intended "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases .... [T]he term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case-by-case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis." *Chem-Dyne*, *supra*, at 1956.

Chief Judge Foreman observed, in the *A&F Materials* case, that "a rigid application of ... joint and several liability is iappropriate ... [because] any defendant who could not prove its contribution would be jointly and severally liable. This result must be avoided because both houses of Congress were concerned about the issue of fairness, and joint and several liability is extremely harsh and unfair if it is imposed on a defendant who contributed only a small amount of waste to a site." A&F Materials, supra, at 1359.

Of course, this Congress may refashion the liability provisions of CERCLA and restate its intentions on that count. However, API/NFPA believe that this Committee and the Senate should be guided by the thoughtful analyses in the above cited cases and decline to impose, by statute, an across-the-board standard of joint and several liability.

In addition, to assure fair allocation of cleanup costs among responsible parties, API/NFPA believe that the Judiciary Committee should recommend legislation which explicitly provides for apportionment. First, persons who may be responsible for costs or damages in accordance with CERCLA § 107 should be allowed to demonstrate that only a portion of the total costs or damages are attributable to hazardous substances generated, transported or disposed of by that person. In that event, this individual will be liable only for such portion. By this means, contributors to hazardous waste sites would be able to demonstrate their fair share of the response costs, settle with the government, and remove themselves from further potential liability at a Superfund site. This "affirmative defense" for generators should be explicitly incorporated in statutory provisions. Second, any liability provision recommended by the Senate Judiciary Committee should require that courts apportion response costs and damages amongst responsible parties in an equitable manner even where parties cannot demonstrate their share.

Such statutory apportionment provisions would encourage voluntary private-party cleanup and make liability litigation more manageable by:

- allowing parties to pay their fair share and thereby remove themselves from further litigation and potential liability;

- quickly producing a fund of money for initiating cleanup actions;

- reducing the number of parties involved in liability litigation and;

- eliminating the need for contribution actions.

Accordingly, API/NFPA urge the Committee to recommend that new § 107(l), created by § 126 of S. 51, be revised by adding the following new subsection 107(l)(5):

> "(l)(5) If a person responsible for costs or damages in accordance with this section establishes that only a portion of the total costs or damages are attributable to hazardous substances generated, transported or disposed of by him, he shall be liable only for such portion. In the event that the portion of costs and damages attributable to each person liable under this section cannot be ascertained, the court shall apportion such costs and damages among the responsible persons in an equitable manner."

For all of the reasons discussed above, API/NFPA urge the Senate Judiciary Committee to reject mandatory joint and several liability as the CERCLA liability standard and to provide for apportionment among potentially responsible parties, as outlined above.

WALKER F. NOLAN, Vice President, Legislative Affairs

EDISON ELECTRIC INSTITUTE The association of electric companies

1111 19th Street, N.W.
Washington, D.C. 20036-3691
Tel (202) 828-7400

June 12, 1985

The Honorable Strom Thurmond, Chairman
Senate Committee on the Judiciary
Senate Dirksen Office Building, Room 224
Washington, D.C 20510

Dear Senator Thurmond:

On behalf of the Edison Electric Institute, I respectfully request that the enclosed testimony be made a part of the Senate Judiciary's record on S.51, the Superfund Improvement Act of 1985.

EEI is the association of investor-owned electric utility companies whose members provide service to 96 percent of all customers served by the investor-owned segment of the industry. EEI member companies generated approximately 75 percent of all the electricity in the country and service 73 percent of all ultimate customers in the nation.

We urge you to consider these thoughts as you proceed with markup of S.51. Please contact Ed Yawn (828-7672) of my office if you have questions.

Sincerely yours,

Walker Nolan

Walker F. Nolan

Enclosure
cc: Senate Judiciary Committee Members

WFN:eya

STATEMENT OF THE EDISON ELECTRIC INSTITUTE
ON
S.51 -- THE SUPERFUND IMPROVEMENT ACT OF 1985

Many of the utilities represented by the Edison Electric Institute have been involved in legal and administrative proceedings initiated under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq*. ("CERCLA" or "the Superfund statute"). Their experience gives us serious concern about the fairness of the Superfund program and leads us to conclude that many of the inequitable aspects of this program may be exacerbated, rather than remedied, if some of the proposed amendments to the Superfund statute -- particularly those that are under review by the Judiciary Committee -- are enacted into law. In this statement, we highlight some of the changes in S.51 that we believe the Judiciary Committee should make before this bill is debated in the full Senate.

I. SECTION 126

A. Deferred Contribution

The concept of "contribution" allows those found jointly and severally liable for an injury to sue others to recover those damages which reflect their share of responsibility for the injury. In the Superfund context, the filing of third-party claims significantly increases the probability that all responsible parties will be brought into a lawsuit, and thereby enhances the opportunities for settlement or an adjudication that will finally resolve the liability of all who are involved in a Superfund hazardous waste site.

Although Superfund does not expressly provide for contribution among responsible parties, several courts have allowed parties sued by EPA to file contribution claims against other third party defendants. S.51 takes an important step forward in confirming that there is a right of contribution in Superfund cases. In doing so, however, it also takes a major step backward by abolishing third-party practice: it prevents defendants from bringing contribution claims until after their liability has been determined. Under this scheme, EPA, states, and any other plaintiffs could single out and sue a few "deep-pocket" defendants (regardless of their relative responsibility for the problems at a site), leaving them with no immediate prospect of contribution from other responsible parties.

The deferred contribution provisions of S.51 would create substantial disincentives to the settlement of litigation. Parties not named as defendants by EPA (and whose potential liability in a possible contribution action therefore will be remote and indefinite) are unlikely to voluntarily assume cleanup responsibility or enter into settlement negotiations with EPA or named defendants. Named defendants will be encouraged not to settle, since they may be forced to bear the full cost of cleanup (which may run as high as $100 million at some sites) with no guarantee of contribution and no means to force other unnamed responsible parties to the negotiating table at the outset of a case.

The deferred contribution provisions now in S.51 do more than just stop third party practice. They also prevent the filing of counterclaims against any plaintiff, including a private party who is itself liable for the costs of a cleanup, for contribution or indemnification. Thus, a defendant might not be able to file a claim alleging that the plaintiff is the party most at fault for conditions at a hazardous waste site until after the court has issued a judgment. Unless section 126 of S.51 is modified, those who are the most culpable parties at a hazardous waste site will have a powerful incentive to be the first to sue others: section 126 would allow them to avoid an adjudication of their own culpability until after a judgment has been issued against the defendants. This procedural advantage would give them powerful leverage because the defendants would be forced to litigate a case to judgment before they could file a claim seeking to make the plaintiff pay for its fair share of the liability.

Given the enormous potential for abuse, the deferred contribution provisions should be stricken from S.51. However, if the Committee instead elects to endorse some form of deferred contribution provision, that provision should be narrowly tailored to apply only to third-party claims -- not counterclaims -- in suits by EPA and the states. There is no justification for ever precluding counterclaims, or for precluding third-party claims in the case of private cost recovery actions under section 107(a)(4)(B) (which, in effect, are third-party claims when the private plaintiff is itself a potentially responsible party). There surely can be no prejudice to government enforcement from allowing normal third-party practice in private actions. Any deferral in such cases would fatally and unfairly prejudice a potentially responsible party defendant vis-a-vis a potentially responsible private party plaintiff.

B. Apportionment Criteria

Under Superfund, a responsible party in some circumstances can be held jointly and severally liable for all of the costs of cleaning up a site, regardless of the amount of its wastes or the degree of its culpability. Although Superfund does not expressly provide for joint and several liability, courts interpreting the statute often have found that it gives them authority to impose such liability.

S.51 does not address the issue of joint and several liability and we understand that the Committee will not formally review this issue. Nevertheless, the onerous consequences of joint and several liability present a problem that should be resolved by Congress. Joint and several liability is fundamentally unfair because it treats alike those who are largely responsible for creating the problems at a hazardous waste site and those who may have sent small quantities of substances to a site. Joint and several liability also places a premium upon continued and costly litigation because each party has at risk potential liability for 100% of the cleanup costs.

We believe that, even if joint and several liability is retained in the Act, the Superfund statute should be amended to require that liablity be apportioned. Language such as originally adopted by the House in 1980 in the Gore amendment, and again in 1984, may serve this purpose. The Gore amendment would have permitted apportionment of liability based on a defendant's ability to distinguish its contribution, the quantity and toxicity of its wastes, its care in disposing of the waste, and its cooperation with public officials in addressing disposal problems. An allocation formula such as this would make for a more sensible and fair division of liability at Superfund sites.

C. Cash-Out for De Minimis Generators

Closely aligned with the need to devise rules for apportioning liability is the need to revise the Act to permit de minimis generators of hazardous substances to fully discharge their potential liability in a quick, economical manner. There is no express mechanism in the current Superfund statute by which de minimis generators (most easily defined in terms of their percentage contribution of wastes at a site) can obtain a prompt settlement of their potential liability and thereby avoid protracted litigation by paying their fair share of the cleanup costs. It is fundamentally unfair for de minimis generators to face the risk of joint and several liability for all response costs at a site. Holding de minimis actors in a case until all questions of liability have been resolved also unfairly subjects them -- and all other parties -- to additional legal costs that are grossly disproportionate to the amounts that a de minimis generator ultimately is likely to pay in a settlement or a judgment. It would be much more sensible for EPA to exercise its authority to reach settlements with de minimis contributors at the outset of legal or administrative proceedings and to apply monies obtained early from these settlements to actual cleanup operations. Toward this end, we would support an amendment to the Superfund statute that would encourage EPA to reach fair and expeditious settlements with de minimis generators.

D. Effect of Settlement

Section 126 of S.51 would protect a settling party from contribution claims brought by a non-settling party for "matters addressed in the settlement." This language is designed to encourage settlements by offering settling parties protection from the claims of non-settling parties. Though this purpose is laudable, it is important to recognize that non-settling parties in some cases may have their own claims, e.g., for misrepresentation in the sale of property containing hazardous substances, against settling parties that they should be allowed to bring regardless of any settlement that might be reached with EPA or a state. As section 126 of S.51 is drafted, it appears that non-settling parties would be free to do so because such claims are not "matters addressed in the settlement." However, in view of the extensive litigation already produced by ambiguities in the existing Superfund statute, the legislative history to any amendments should clarify that parties with unrelated, independent claims against settling parties will not be precluded from bringing such claims.

II. SECTION 133 - PRECLUSION OF JUDICIAL REVIEW

Section 133 of S.51 would amend current section 113 of CERCLA to permit judicial review only if a suit is initiated by EPA -- either to force parties to clean up a site or, if EPA chooses to clean up a site itself, in a cost recovery action. In addition, section 133 provides that courts must limit their review of the adequacy of response actions taken by EPA under the authority of sections 106 or 107 of CERCLA to the administrative record, except where there are "major deficiencies" in the administrative record. Courts would be required to uphold the selected response action unless the decision is shown to be arbitrary and capricious or otherwise not in accordance with law. Even then, the courts may award response costs or damages to the extent that such relief is not inconsistent with the National Contingency Plan -- a Plan which confers broad discretion upon EPA and which does not address

all of EPA's legal obligations under the CERCLA program. The only objection that may be raised in litigation is an objection previously raised with "reasonable specificity" during the comment period -- a period that typically will be 30 days. In reviewing alleged procedural errors, a court may disallow costs or damages only if the errors were so serious that the action would have been significantly changed if the errors had not been made.

Under the judicial review scheme crafted in section 133 of S.51, a party seeking to defend an EPA enforcement or cost recovery action, must

(a) wait until after EPA's response is completed -- potentially many years after the party was ordered to fund the cleanup;

(b) make its objections with reasonable specificity on the record during any applicable comment period;

(c) prove, on the basis of the administrative record alone, that the challenged action was arbitrary and capricious or otherwise not in accordance with law;

(d) prove that any such actions were inconsistent with the national contingency plan; and

(e) further prove that any procedural errors in these actions were so serious that the action would have been significantly changed if the errors had not been made.

This review procedure effectively forecloses meaningful judicial review and confuses rulemaking procedures used in environmental statutes for the promulgation of regulations (which were the model for section 133's language) with adjudication procedures needed for review of agency action in individual cases. Furthermore, without the opportunity to seek pre-enforcement review, a "potentially responsible party" that has objections to EPA's proposed cleanup plan is put to an unfair choice: it must swallow its objections and comply with an order to clean up a site, or not comply and risk treble damages (three times the cleanup costs) and penalties of up to $5,000 per day. This is a heavy threat: a party denied pre-enforcement judicial review may have no practical choice but to comply with an order it believes to be unjust.

Early judicial review also is essential so that remedial action plans will receive the public and judicial scrutiny necessary to ensure that they are both environmentally sound and cost-effective. Under current law, which places full liability for response costs on responsible parties, EPA has little economic incentive to develop cost-effective plans; only the threat of public scrutiny followed by meaningful judicial review provides any check on its actions. By precluding pre-cleanup review -- as well as any meaningful post-cleanup review -- of remedial action plans, section 133 of S.51 removes an important check upon excessively costly and environmentally unsound cleanup operations.

Section 133 makes a sharp retreat from the regulatory reforms endorsed by this Committee and the full Senate in 1981 and 1982. As in the legislation endorsed then, Superfund now should be amended so that the parties affected by final administrative decisions are given a meaningful opportunity to be heard: they should have the right to contest agency decisions before it is too late to correct the resulting damage, and courts should not be hampered by an unduly restrictive standard of review from issuing orders that will require an agency to reconsider ill-advised decisions.

III. SECTION 138 - CITIZEN SUITS

The new "citizen suit" provision in section 138 of S.51 might threaten the federal courts with a flood of litigation that will greatly complicate the cleanup of Superfund sites. This section would permit any person to file suit in federal court (a) to enforce standards, regulations, conditions, requirements or orders, and (b) against EPA to compel the agency to perform non-discretionary duties.

The Superfund program is designed to be administered and supervised by EPA. This is essential if there is to be consistency, uniformity, and technical oversight in the cleanup of potentially thousands of hazardous waste sites throughout the country. If citizens are to be given a primary role in the Superfund program through citizen suit authority, the process of cleaning up hazardous waste sites will be conducted by those with differing interests, and will result in cleanups of vastly differing quality. Private citizen suits may embroil courts in litigation over the proper standards and technologies to be applied at particular hazardous waste sites. Courts are not well equipped to resolve these highly technical matters, particularly when EPA is still in the process of developing its own policy concerning the use of legal and technical standards to determine the level of cleanup required at individual sites.

In the Superfund progam, citizen suits do not serve a useful purpose. If, however, Congress elects to include some sort of citizen suit provision, the bill itself and the legislative history clearly should specify that citizens do not have the right to sue to compel cleanup activities or to obtain certain levels of cleanup in cases where cleanup activities have begun. At most, the citizen suit authority should be used to address other aspects of the Superfund program.

CONCLUSION

While the members of the Edison Electric Institute have numerous concerns about the provisions of S.51, we have in this paper only addressed those matters that will be reviewed by the Judiciary Committee. We believe that individual companies should not be asked to assume liability for a disproportionate share of the total cleanup costs. Rather, the expeditious cleanup of the nation's hazardous waste sites should be brought about in a manner that minimizes the transaction costs to affected parties and assures fairness in any litigation arising out of the Superfund program. These important objectives will be furthered if the Committee deletes the deferred contribution and citizen suit provisions in S.51, permits timely and more searching judicial review of cleanup activities, and endorses rules that apportion liability and permit small generators to discharge their liability in a fair and timely manner. If the Committee makes these improvements to S.51, the bill, and hopefully the Act itself, will be more sensitive to the regulated community's concerns with the Superfund program.

J Donald Annett
Vice President

Texaco USA

1050 17th Street NW
Suite 500
Washington DC 20036

June 12, 1985

Honorable Strom Thurmond
Chairman
Senate Judiciary Committee
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to ask your Committee to strike the Victim Assistance Demonstration Program from S. 51, the Superfund Reauthorization bill. This provision is opposed by the Administration and virtually all sectors of the business community, including The Business Roundtable.

The Senate Finance Committee, after careful deliberations, has already voiced its objections by striking all funds for this provision. Since authorization for Section 129 still remains in S. 51, your Committee should delete it entirely.

If the Victim Assistance Demonstration Program remains in the bill, there will ensue citizen suits challenging the provisions required by the new law. Further, civil suits against the owners and operators of hazardous materials sites will also unquestionably occur as a result of creation of the program and findings thereunder by the federal government. These suits could have a substantial impact on the federal court system and will delay further efforts to clean up abandoned hazardous waste sites.

Enclosed is a statement issued by The Business Roundtable which describes the serious flaws in the Victim Assistance Demonstration Program. This same statement was filed with the Senate Finance Committee. I would appreciate your consideration of this important issue.

Sincerely,

J. Donald Annett

JDA:caj
Enclosure

SUPERFUND VICTIM ASSISTANCE DEMONSTRATION PROGRAM

POSITION: The Business Roundtable opposes the provisions in S. 51 related to the Victim Assistance Demonstration Program. This concept is fundamentally flawed and should not be funded by the Senate Finance Committee. The complex issue of compensation for individuals injured by a hazardous substance must be addressed on its own merits. The Congress should conduct hearings, document specific problems, and then craft new legislation to address these problems as appropriate.

JUSTIFICATION: A Victim Assistance Demonstration Program added as section 129 of Senate bill S. 51, the Superfund reauthorization bill, would provide grants totalling $30 million a year to states to reimburse individuals at risk from exposure to a hazardous release, for both unreimbursed medical costs and for future medical surveillance.The grants are intended to be a "demonstration" program in five or ten areas, selected during fiscal years 1986 and 1987, although payments from the grants would be made for three to five years.

This concept is fundamentally flawed and must be rejected for the following reasons:

1. THE SUPERFUND SHOULD BE FOR A CLEAN UP OF HAZARDOUS WASTE SITES ONLY

The primary purpose of Superfund is to assist with the clean up of abandoned or uncontrolled hazardous waste sites that threaten public health, welfare and the environment. If Congress desires to create a medical assistance program for individuals who have been placed at increased risk of injury due to releases of hazardous substances, this issue must be considered separately. The financial underpinnings of this important national program should not be compromised by an additional financial requirement that may prove to be unbounded.

2. THE FIRST STAGE OF A NATIONAL CATASTROPHIC HEALTH PLAN:

Because the proposal does not adequately define who is eligible for coverage in these "pilot" grants, individuals whose exposure to a hazardous substance is not associated with a waste site (someone who attended a school with asbestos insulation, for example) could receive benefits. In addition, because of the causation problem, persons with a wide range of illnesses, coupled with any of a wide range of exposure, could be eligible . Such imprecision in eligibility standards would very likely lead to far more persons being eligible for benefits under the proposal than realistically would have an illness caused by hazardous waste exposure. This could also lead to further attempts, in the interest of "fairness," to loosen eligibility requirements and broaden the benefits, potentially leading to a costly, burdensome national catastrophic health insurance program only tangentially related to hazardous releases.

3. LARGE NEW AND EXPENSIVE BUREAUCRACIES WILL REQUIRED

The scope, vagueness and other problems associated with this program will unquestionably require new and expensive bureaucracies at the state and federal level.

4. THE COST OF PROGRAMS WILL ESCALATE DRAMATICALLY AND BE POLITICALLY IMPOSSIBLE TO EVER TERMINATE

Even the benefits as defined in the proposal are likely to be far more costly than its sponsors intend. For example, lifetime medical surveillance costs for persons with no demonstrable injury amounted to more than $20,000 per person in the recent hazardous waste case of Ayers v. Jackson Township. And the number of people who will be able to establish eligibility through some "exposure" is likely to be quite large once benefits are established. Further, once any group of citizens have enjoyed a benefit under such a program, the political pressure to maintain or expand the benefit will be enormous, regardless of the program's merit. Previous experience with compensation funds has been that costs have escalated far beyond initial intent. For example, the black lung program was established in 1969 to compensate coal miners for a single disease (black lung) related to coal dust exposure. The program was originally designed as a "one shot" program to terminate in 1976 at an estimated total cost of $350 million. Subsequent amendments expanded jurisdiction, increased the number of illnesses covered and made the program permanent. According to a 1980 report by the General Accounting Office, 88.5 per cent of the claims approved for benefits did not contain adequate medical evidence to establish a coal miner's disability or death from black lung. By 1981 the black lung program was paying benefits to some 460,000 individuals, more than twice the number of coal miners employed at that time. In addition, by 1981 black lung beneficiaries had received $11.5 billion in benefits, more than 30 times the initial cost projection. Similarly, the Longshoreman's and Harbor Workers' fund, amended 10 times, grew from $43 million to $350 million -- a 726 per cent increase from 1972 to 1982. Once in place it would be politically difficult to ever terminate.

5. A NATIONWIDE PROGRAM WILL START OUT COSTING 2.5 BILLION DOLLARS

Based on conservative assumptions, a preliminary estimate of the cost of the proposal, were it extended into a nationwide program is about $2.5 billion a year. This is based on medical treatment and assumed surveillance cost of $500 each for an average of 10,000 people per site at 500 sites (half the projected National Priorities List, halved again to represent those with no solvent responsible party). Medical treatment costs were based on national cancer statistics. There would be an average of about 30 cancers per site. This estimate assumes half of these would be eligible for the program's coverage, that 13 would have health insurance but would be compensated for the unreimbursed portion of their costs (probably 20%), and that 2 uninsured persons with cancer would be fully reimbursed. Using these conservative estimates, each site could cost some $5,046,000 per year, or a total, for 500 sites, of about $2.5 billion per year (see Enclosure for details). Of course, the program costs could be radically higher since the proposal covers release of any hazardous substance, not just releases from Superfund sites.

6. THE PROGRAM IS UNINSURABLE

There is no actuarial data to provide a basis for establishing premiums for the type of health insurance program envisioned by this proposal. The insurance industry would administer such a program for State or the federal government only on a cost plus a service fee for processing claims basis. Since the program is "uninsurable" in the conventional sense, potential costs of this program can neither be estimated accurately nor controlled.

7. PROBLEM OF SCIENTIFIC CAUSATION IS UNRESOLVED

The proposal does not solve the critical problem of determining scientifically which cases of a particular illness, if any, are caused by exposure to a hazardous release. Nor does it distinguish between individuals whose exposure has been substantial and those whose exposure has been slight. The result is that for certain benefits, such as medical screening and testing -- in themselves very costly, large segments of the population could be eligible. Once cause and effect tests are abandoned, there is no way to limit the size and cost of the program.

8. THE SUCCESS OR FAILURE OF THE PROGRAM CANNOT BE DETERMINED

The proposal does not set out clearly by what criteria the "demonstration" would be judged. By the number of applicants for the grant benefits? By incidence of illness "caused" by hazardous releases? Is it a scientific standard? A politically defined one? Although billed as pilot program, it more accurately appears to be the beginning, on a limited scale, of a far larger program.

9. SUBSTANTIAL DUPLICATIONS OF EXISTING PROGRAMS

Some provisions of this proposal could result in services that duplicate existing programs or that are unrelated to hazardous waste. The proposed program, for example, appears to duplicate Sec. 104(i) of Superfund, which provides for an extensive information-gathering in order to demonstrate the scope of any problem of chronic illness caused by exposure to hazardous wastes. Employees may be eligible for certain benefits for on-the-job exposures, in addition to Worker Compensation benefits.

UNANSWERED QUESTIONS: The following questions must be resolved before Congress can act on the Victim Assistance Demonstration Program

1. What specifically is the program seeking to demonstrate? By what criteria would the utility and effectiveness be judged?

2. Is this proposed program essentially the same as Sec. 104(i) of CERCLA which provides for extensive information-gathering (reports, literature, areas closed to the public, etc.) that can "demonstrate" the scope of any alleged problem? Doesn't the provided medical assistance program duplicate the medical services already available from the Public Health Service under Superfund Sec. 104(i) and (4) and (5), including screening and hospital care?

3. What are the estimated costs and staffing requirements for both EPA and the states to administer the proposed demonstration program? Are these costs in addition to the $30 million annually? What would be the start-up time to adopt implementing regulations, hire necessary staffs, complete the necessary health criteria studies, etc., to fully activate a demonstration program? Can these large start-up costs be justified for a program which may run only a year or two?

4. What is the difference between an "area" and a state for purposes of selection and funding? If one state demonstrates that a certain "area" is located in two states, which state is eligible or can both apply, thereby creating potentially 10 to 20 programs with immediate pressure for more funding?

5. Because the program appears to be designed to be non-duplicative, will there be an incentive for persons to terminate any health and insurance programs that they presently have? How will the "30 days prior" requirement be enforced and audited?

6. Once such a program has been activated, how long must it run in order to demonstrate whatever it is that tne program proposes to "demonstrate?" How do these considerations interrelate with an annual budget of only $30 million per year? More specifically, how can we plan and budget for the initiation of new programs in the second and third years when the five to ten programs started in the initial year will probably require more than one year to staff and implement

and more than one year to adequately test and "demonstrate?" (For example, if the first five to ten programs, with normal growth, required an aggregate of $30 million a year, how can we realistically plan to fund successor programs in subsequent years during the reauthorization cycle?)

7. Can the states, at federal expense, add benefits to the program (e.g., genetics screening and psychological counseling)?

8. Will qualified claimants be turned down once the annual budget for a program has been expended for a particular year? Medical expenses for a particular disease or injury may well run for many years; will claimants receiving compensation under the program have these payments abruptly cut off when the demonstration program is concluded?

9. If adequate budget funds are not available to compensate all available claimants in a demonstration year, what criteria will be utilized to determine which claimants will be paid and which will not? Can a person with a disease or injury residing in an area outside the demonstration project, but who previously lived and experienced exposure within the demonstration area, move back and be eligible to receive compensation?

10. Are the criteria for claimants' eligibility under this program more liberal or more strict than the criteria under the Black Lung program?

11. Why hasn't the demonstration project been limited to claimants who can establish an exposure to a hazardous waste from an abandoned waste site or that portion of a hazardous waste site for which no solvent responsible party can be identified? Does the program cover municipal or federal sites?

12. What is the conceptual difference between "association," increased risk "due to exposure" and causation?

13. Does a claimant have to show simply that there was an exposure and that the symptoms are associated with a disease, rather than that the disease was caused by that exposure, in order to obtain reimbursement of past medical costs and insurance for future medical costs?

14. Won't the Victim Assistance Demonstration Program be used to compensate persons claiming injury from all environmental exposures, as well as workplace and consumer exposures, because:

    (a) "Release" of a "hazardous substance" is not required to be from a "facility" as required by CERCLA today;

    (b) Current and retired workers, such as shipyard, refining, chemical or construction workers, who are exposed to asbestos or other hazardous substances in the workplace, could claim eligibility for medical testing, screening and evaluation, which are not traditionally covered by workers' compensation; and

    (c) Certain consumer products, such as asbestos, solvents and lead in paint, might be "released" into the immediate environment of the worker of consumer?

15. Once it is established, could that part of the program which does not require "exposure to a hazardous substance from a release," in order to provide screening, examination and testing, a group medical benefits policy and reimbursement of out-of-pocket costs, cover persons exposed to the indoor environment (e.g., asbestos in schools and formaldehyde in

homes or tailpipe emissions from cars, trains, boats and planes)?

16. Is the insurance industry prepared to make available the type of "group medical benefits policy" contemplated by the demonstration program? If so, what would be the cost of such a policy?

17. How does a completely uncapped program of medical expense reimbursement fit in with current efforts in both government and industry to contain runaway medical expenses?

18. What amount of staffing and claims investigation costs will be required to insure that payments under the demonstration program are not duplicative of benefits received by the claimant under other programs?

19. What administrative and enforcement mechanism would be required to avoid fraud and duplicative payments? How large a staff and how costly will these controls be?

20. Will the Victim Assistance Demonstration Program result in increased litigation and transaction costs and potential clean up delays as states or the fund seek reimbursement from responsible parties pursuant to Sec. 112(c) of CERCLA?

BEFORE THE

COMMITTEE ON JUDICIARY

OF THE

UNITED STATES SENATE

A STATEMENT BY

NATIONAL TANK TRUCK CARRIERS, INC.
2200 Mill Road
Alexandria, VA 22314

IN THE MATTER OF:

RECONSIDERATION AND REAUTHORIZATION OF

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE
COMPENSATION AND LIABILITY ACT

National Tank Truck Carriers, Inc. (NTTC) is the trade association of the for-hire tank truck industry. NTTC members are engaged in the transportation of hazardous materials, hazardous substances and hazardous wastes, throughout the continental United States.

As "for-hire" or "common" carriers it is the nature of our members' business to provide transportation of goods at the behest and direction of those placing such goods in the distribution network--commonly known as "shippers". Such distribution, via common carrier, is accomplished under either (a) publically filed tariffs; or, (b) contracts between carrier and shipper. It is the very nature of common carriage that the shipper directs the transportation service and designates points of pick-up and delivery.

In the months preceeding 1980 enactment of "Superfund", Congressional Committees of jurdisction evidenced much concern over the activities of so-called "midnight dumpers". Such illegal operators would generally be the owner of the vehicle and would solicit loads of hazardous wastes for disposal. In every case the transportation service, after pick-up including dump site selection is made by the owner or operator of the vehicle, not the shipper.

The Congress recognized this situation and specifically differentiated between the common or contract transporter and the "midnight dumper", by exempting the former from the liability scheme within Superfund. This was accomplished in Sections 101(20)(c) of the Act.

Briefly stated, the transporter was exempted from liability if it could be shown that the transporter acted in the capacity of a common or contract carrier. That is, the carrier did not select the point or facility for disposal of the product transported.

Conversely, if the transports selects the point of disposal or delivers to a point or facility other than that specified by the generator the carrier is subject to potential liability for clean-up and/or remedial action if such occurs.

NTTC urges retention of the present statutory language.

We ask the Committee to recognize that the transportation of hazardous wastes is a vital and integral part of this nation's pollution control program. Such transportation must be entrusted to responsible carriers which are both sensitive to and cognizant of the risks, the law, the regulations and their responsibilities to society.

Section 101 of CERCLA Law, as enacted, was written to serve the purpose of providing transportation for environmentally-sensitive products while, at the same time, establishing a meaningful liability scheme. It correctly protects the responsible common or contract truck carrier from unreasonable liability risks, while rightfully establishing liability for those responsible for unscrupulous activity.

Therefore, NTTC believes that Section 101(20)(c) should be retained.

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